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HARVARD LAW REVIEW

LANGDELL SEMI-CENTENNIAL NUMBER

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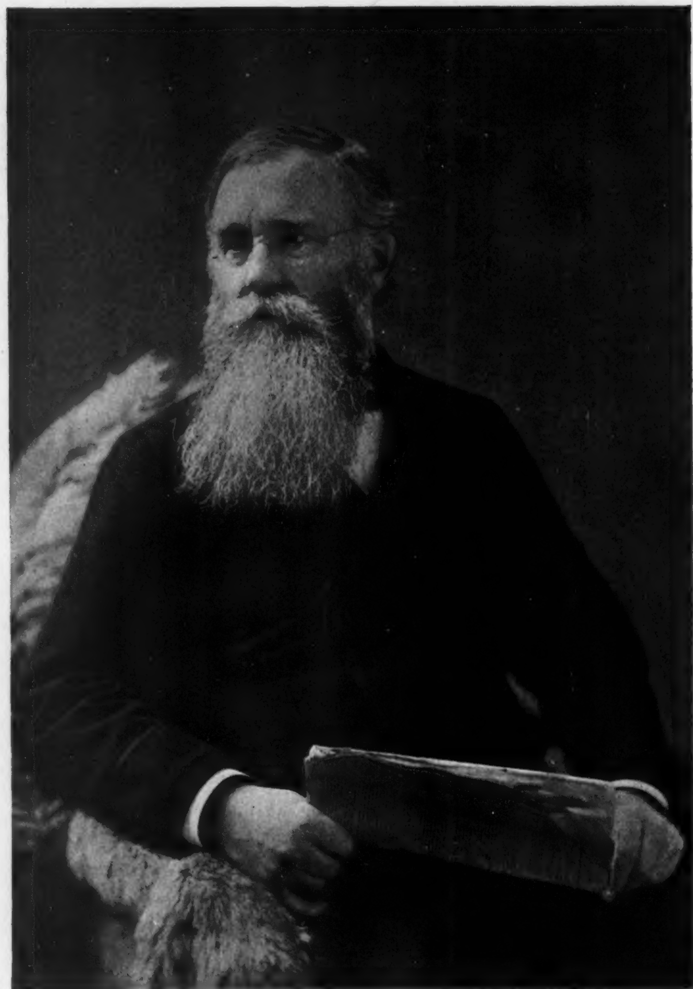

DEAN C. C. LANGDELL

HARVARD
LAW REVIEW

VOL. XXXIII FEBRUARY, 1920 NO. 4

THE REBIRTH OF THE HARVARD LAW SCHOOL

THE writer has been asked many times to give his recollections of the occurrences with which he was familiar during the early years of Professor Langdell's services to the Harvard Law School. He has hesitated to do this. But so urgent have been the requests, based in great measure upon the fact that those who were in the School during that eventful time are rapidly passing away, that he has reluctantly yielded. He is conscious that what he has written does not adequately portray the situation and events. He realizes that it is more or less fragmentary. But he has endeavored to give some accurate description of those days. It has seemed best to omit the names of teachers and students, even of those who were prominent. The single exception in the case of Professor Ames is necessary, in order that a salient characteristic of Professor Langdell's work may best be illustrated. If any feel that what is said is too eulogistic of Professor Langdell, the writer is sure that the survivors of those who were connected with the School in 1870–72 will not share that feeling. He is confident that there will be no difference of opinion concerning President Eliot's responsibility.

It is a striking fact that the Harvard Law School for almost fifty years, nearly one half of the period of its existence, has followed uninterruptedly the method of instruction originated by Professor Langdell in 1870, a method radically different from any

previously in use, and that this method has been pursued for many years by most American law schools.

Before that time the School had a wide and favorable reputation at home and abroad, and a history of which its graduates and friends were proud. It had had the services of eminent lecturers and professors who, in addition to instructing the students, had written legal treatises which were recognized as authorities. Among its graduates were men who had achieved the highest distinction on the bench and at the bar. Yet for some time before 1870 there was a growing dissatisfaction with the condition of the School and a feeling that the way in which it was being conducted was susceptible of improvement. Some requirements, while of apparent value, were not enforced. The laxity of study among many of the students and the ease with which the degree of LL.B. was obtained alike by the deserving and the undeserving were disquieting. Before the fall of 1870 the degree was given on the recommendation of the faculty to students who had studied three terms in the School, or who had studied two terms in the School and had been admitted to the bar after one year's study of law before coming to the School. Sufficient pains were not taken to ascertain whether they had in fact studied. The statement of the applicant, that he had studied and attended lectures, practically sufficed to gain the degree, a statement which, as can readily be understood, was freely given and accepted. While the greater part of the students were studious and a considerable portion were graduates of colleges, there were many of slight previous training who were attracted by the Harvard degree. Some entered a higher educational institution for the first time. Entrance to the School was free — *i. e.*, without requirement as to previous study — to all and at all times of the school year. It occurred occasionally that some of those who had attended a term, having learned of undergraduate happenings, felt it their privilege, if not their duty, to haze a newcomer. It is difficult for the graduates and members of the last forty-five years to realize this. In the lecture room the courses were not stimulating to many. Although the greater number worked faithfully and profited by their work, yet many preferred a course of ease. There was no examination for the degree.

In 1869–70 the faculty consisted of the president of the university and three professors of law, who were the teaching force.

There were three classes,—senior, middle, and junior. The method of instruction had been for years by lectures.

The authorities of the University examined carefully into the condition of the School, and a thorough reorganization resulted. The office of dean was created. Examinations for the degree were prescribed. In the spring of 1870 Mr. Langdell was appointed professor and made dean. These changes were fundamental in their effects on the future of the School. It has become a tradition that President Eliot was led to appoint Langdell professor by his remembrance of hearing, while a junior in college, Langdell in his room in Divinity Hall talk law in a way which indicated genius. Undoubtedly this caused him to think of Langdell. But it should be said that before the appointment was made much time was spent and great pains were taken to obtain the fullest information about Langdell's work after he left the School and practiced law. Eminent professors, judges, and lawyers were conferred with. While opinions differed, as a result of the inquiry the School fortunately acquired the services of this rare man.

In the fall of 1870 the Law School was located on Harvard Square in Dane Hall, which was in the southwesterly corner of the yard of Harvard College to the west of Wadsworth House. The building was of brick and contained a lecture room in the second story, a library room in the first, and private rooms used by the regular professors. The entrance was up a few steps to a porch and thence to the main hallway. Then, as before, no entrance examination or particular course of previous study was required for admission. The only requirements were, first, age nineteen years or over, and secondly, good moral character. Students could enter at any time of the year. As before, the School was open to all at all times of the year. The liberality as to entrance was, of course, attractive. Of the students who were enrolled in the fall of 1870 more than one half held no degree from any institution of learning. Yet there were many well-educated men. The School offered a complete course of legal education, except in matters of mere local law and practice, for those intending to practice at the bar of any state of the United States. There were seven required and eleven elective studies. Instruction was given, first, in recitations; secondly, by lectures and expositions; thirdly, by moot courts; fourthly, by cases assigned to students for written and oral opinions; fifthly,

by drawing pleadings at common law and in equity. The first was new to the School. It originated with Professor Langdell, and meant an entire change in the method of instruction. The faculty, as before, consisted of the president of the university and three professors. The dean was the head of this department. This was an important and valuable innovation. The professors and four lecturers constituted the teaching force. There were no distinct classes. The courses and lectures were open to all. Access to the shelves of the library was free and unobstructed. As some of the professors and lecturers used published treatises in books as the bases of their lectures, students were allowed to take such text-books from the building for the purpose of study. There was a large number of copies of these books in the library for such use.

The experience of one who entered the School in 1870 is interesting in this connection. He was an entire stranger to the University and to the students of the School. As he passed up the steps to enter the building there were three or four young men, evidently students, standing on the porch, who looked at him critically. He inquired the way to the office of the dean, where one presented himself for admission to the School. This work was among the manifold duties of the dean at this time. There was no secretary. One of the young men addressed him as "Freshie" and gave complicated and bewildering directions which his companions approved; and suggestions of future hospitality on his part toward them were made to him. He went into the building and was then directed by some one to the office. Professor Landgell asked many questions in addition to the routine inquiries. Some of them are interesting in view of the requirements for entrance made years after. They related to previous training and education; and it was evident he thought that a person who had not received a sound preparatory training might find the courses very difficult. For such he suggested hard outside work to supply, in a measure, the deficiency. When this reception was mentioned afterwards to students and graduates, most of them expressed much surprise, inasmuch as the prospectus stated that no previous study was required; and further, they said that since it was highly desirable that the numbers and the income should be increased it was a serious mistake to discourage men from entering. They reasoned that if one attended the lectures he should acquire enough legal knowledge to fit him for the legal

profession, that too much learning was in the way, that work in the School was more important than prior training, that the prospects of the School would be injured. A few, however, agreed with Langdell. This was the first indication of his attitude in this respect of which the writer has heard. Whether this is the true policy is, although seemingly, not yet really settled. It is questioned by many — not a large number, it must be admitted. On the one hand, it is urged that the School would be swamped by the vast number who, judging from past experience, would come with the mistaken belief that they could continue the course of studies successfully and who would overwhelm the School with their numbers and throw confusion into it; that the accommodations in space are insufficient, and that they would seriously and disastrously interfere with, and most likely destroy, the carrying on of its work. On the other hand, it was and still is urged that an educational institution cannot properly deny the right of those who, although they do not have a preliminary training, have been, as has been shown in former years, and are, able to pursue the course equally successfully with those who have had prior educational advantages. It would have been a misfortune if Simon Newcomb had been denied admission to the scientific school because he held no college degree. However this may be, Langdell favored the requirement of a degree for admission to the Law School.

Again, in the fall of 1870 a new and drastic change was made with reference to the degree in law. Announcement was made that while students not candidates for the degree could avail themselves of the advantages of the School in whatever measure and to whatever extent they might see fit, it would no longer be given as the result of practically mere attendance. The applicant for the degree was required to pass satisfactorily thorough and searching examinations in all the required subjects and in at least seven of the elective courses, after having been in the School at least one year. Graduates and warm friends of the School were greatly alarmed by this requirement. They said that there was no need of it; that success in passing examinations would not bring success in actual practice of the law, and that, after all, to prepare for the actual work of the law was the reason that young men attended; that it was unnecessary to take such steps to ascertain whether there had been serious study in each case; that the statement of the

student always had been and should be sufficient, and that such a step would inevitably injure the School by decreasing the attendance and consequently the income. It is hardly necessary to say that most of the students were opposed to this radical change. A small number favored it.

As we have before stated, the method of instruction had been for years by lectures. In the year 1870–71 this was generally the case. Some of the professors and lecturers literally lectured, that is, read from textbooks or prepared notes, pausing occasionally to make some explanation, and infrequently to answer questions asked by courageous students. A few of the lecturers gave out in advance the subject of the particular lecture, and talked not only to, but once in a great while with, the learners.

This fall (1870) Langdell practically began his long service in the School. There was great curiosity as to what he would do. It was generally believed that his was to be a new method. But no one had any conception what it would be until the students were given, in advance of the lecture, sheets which contained reprints of cases, the headnotes omitted, selected from various reports. As he followed Lord Coke's *melius petere fontes quam sectari rivulos* the first selections were taken from old reports. The sheets for the civil procedure course contained early forms of pleading, in Latin. The latter excited many forcible comments. Some asked why they were not given extracts from ancient tablets. On the appearance of the cases and forms the proposed system was condemned in advance by practically all.

There was but one lecture room. The lecturer occupied a slightly raised small platform at one side of the room, a desk in his front. The students' seats, comfortable, cushioned settees, were arranged in a semicircular manner, rising from front to rear. There were no conveniences for taking notes save a few small square tables which flanked the lecturer's desk on either side. The janitor enjoyed the privilege of letting these tables. Although thus condemned in advance, Landgell's first lecture excited keen interest. The subject was Contracts. While it was a beginner's course, most of those who had been over the subject during the preceding year felt drawn to the lecture. The attendance was unusually large. It filled the room. Langdell began. A short and vivid account has been given by Mr. Batchelder of the way in which Langdell began, — by

questioning students about the case of *Payne* v. *Cave*.[1] After the preliminary inquiries as to the facts, arguments, and opinions had been made, further questions were put to draw out the views of the students as to the arguments and opinions. At first it was almost impossible to get much expression; for it was evident that very few had studied the case critically, and had had no thought of forming any judgment of their own. And so as question after question was put, all presupposing a careful examination into the various aspects of the case, the answerers for the most part said that they were not prepared. The new men generally had not studied law at all. It seemed to them the height of presumption to have, and much more to express, an opinion. It was to learn rules of law that they had come to the School. When they had accomplished this they might have some right to state their views. They thought it absurd to undertake to give their thoughts about a subject of which they knew nothing. Those were courageous indeed who ventured to participate. Langdell asked more and more questions. As it now comes to the memory of one who was present, there was a series of admirable, analytical inquiries. At the time, the general judgment of the students was that it was a childish performance; for nearly all, if not all, failed to see at the beginning that the method was to analyze the case closely and to extract the essential elements, and in this way to grasp the real legal principles involved. But the hour passed with amazing rapidity. When it ended there was a great deal of comment by those who had been present. Interest had plainly been excited, but principally in the method of teaching. By far the greater number openly condemned the new way. They said there was no instruction or imparting of rules, that really nothing had been learned. Older students said they theretofore had received something, even though in a preliminary way, from professors and lecturers, but here was an entire absence of anything but a seeking of expressions of opinion from youths who were ignorant of what they talked about; that no rule or suggestion of any rule of law had been hinted at; that certainly it was no way to learn law, for the law was not in the idle talk of these young boys; that the performance was foolish; that Langdell acted as if he did not know any law; that it would be more profitable to attend other lectures where something could be learned. Yet

[1] 3 T. R. 148 (1789).

there were a few who felt a quickening of their zeal, who were certain that they had received an impulse, who insisted that they got "something which somehow lasted," as one of them, since famous at the bar, expressed it.

In most of the other lectures the course of instruction followed the ways of former years. The instructor used a textbook, reading from it and making such comments as he deemed advisable, and suggesting that cases which he cited from law reports be examined. Occasionally a student would ask a question and the instructor would reply. But the textbook furnished the real subject of the hour. General discussion was very rare. The writer never heard any. It was assumed that the author of the textbook had examined the subject and had found out the true rules of law relative thereto. Thus the rules were given. There was little, if any, examination made, outside the textbooks from which the instructor read, by the students with the purpose of ascertaining how the rules originated or why they existed. It was assumed that these rules were right. Thus it was a process of absorption. One stout advocate of this system said, "Professor —— and his book fairly exude law. We take it in and assimilate it." The result of the method of Langdell was active search and inquiry; that of the other professors was passive absorption. One produced work and constant discussion outside the lecture room among the students; the other, acquiescence in what was read by the lecturer. One excited earnest inquiry; the other produced a feeling of satisfaction in hearing the rule announced. On the one hand, accuracy of thought and expression were encouraged, tending to clear perception of sound distinctions and to the discovery by the student of the principles involved. On the other hand, acceptance of the conclusions of some one who announced the law was the expected and acceptable result. The second was by far the more popular method among members of the School; and it practically had the general approval of professors, graduates, and those engaged in the practice of law. Langdell's methods were novelties and were distrusted. There was much curiosity as to how they would turn out. Attendance fell off. Students wearied of the "useless" preparation for the "grammar school recitation," as it was called, and the number of those "prepared" dwindled away to very few. The consideration of quite short cases in the advance sheets occupied several lectures. It

seemed a waste of time. No advance appeared to be made. It was said that a half hour's perusal of a textbook would yield more information than could be obtained by several weeks' talk, mostly by the students themselves, in the lecture room. Comparisons were made between the two methods, much to the disadvantage of the new way. It was predicted that Langdell's course on Contracts could not be finished in two years, that one half could not possibly be gone over in a year; whereas the courses of the other professors and lecturers could plainly be gone over with ease within the allotted time.

Again it was asked why Langdell did not give his own opinion, as the others did. It is true that he failed to express himself, although in the early stages of his teaching many questions were put to him in order to draw out an expression of his views. On these occasions he became absorbed in thought and seemed to falter. Usually he asked questions in reply. This occasioned harshest criticism. It was said that he did not answer because he did not know, that Professors —— and —— *knew*, and therefore they replied. On one occasion one of the students who was a steadfast admirer and follower of the new way succeeded in eliciting an immediate answer to a question. After receiving the answer he put several more questions with a skill which it is doubtful whether he has surpassed in his subsequent distinguished career. Langdell was routed. There was violent applause from the greater part of the class. Dust arose in considerable quantities from the settee cushions, which were vigorously used in the demonstration. This occurred at the last of the hour. At the end there was much excitement and expressions of sentiment among the students who had applauded, who said that Langdell had been caught like a small boy — that no law could be learned in such a course and from such a man, who plainly did not know the law. It made little if any difference to them that at the next lecture Langdell took up the question again and discussed and treated it most profoundly. Not many appreciated the treat given them; and very few saw that it was a sincere pleasure to him that the students should study the subject so carefully as to be able to put such pregnant questions. The writer has known professors to make statements involving inconsistencies with what they had said a short time before; but these lapses were usually ignored by the few who no-

ticed them. The judgment of Langdell's critics was adverse and seemingly final.

Even thus early in his career it had dawned on some that Langdell was not undertaking at all to state what the rules of law were, that his real purpose was to incite the young men before him to find them by their own researches and that he felt his own opinions to be of no consequence when compared with the importance of leading them to think and form their own judgments. As before stated, it must be said that to the great majority the road to legal learning led through textbooks and bald statements of what the law was; memory against youthful logic. If it happened that decisions quoted or referred to in the textbook or lecture were in conflict, the doctrine of the textbook used by the professors was accepted. On rare occasions some Langdell follower ventured to ask question of other lecturers during their hours; but the results were different from those derived from Langdell. There was no discussion. The outcome sometimes was unsatisfactory.

A single instance by way of illustration will be sufficient. The course was on Evidence. The textbooks were two, Greenleaf and Best. The immediate subject was Burden of Proof. The lecturer stated that while the rules given in the textbooks were good, on the whole perhaps the clearest rule was that the burden was on the party who, if the case should stop at any point in the proceedings, would as a matter of law lose. One of the men asked him how it would be known who would lose. The reply was in substance that the judge would rule. The student asked how the judge would know. This caused a good deal of amusement; for this student seemed bold indeed to question in this way the wisdom of a judge. He was told that the state of the evidence would enable the judge to rule. He was quiet during the remainder of the lecture; but during the recess he approached the lecturer. A number of students were attracted and followed. He asked again, and receiving practically the same reply, said that the rule seemed to be that the burden of proof was on the party who had the burden of proof. Would the judge come to his conclusion in any way other than being convinced that the burden was or was not sustained? The lecturer said that it was necessary to distinguish between the *onus* and the *pondus*. As the next lecture was about to begin, the matter was ended so far as this course was concerned;

but not with some of the students, who got together and talked the question over earnestly, the general opinion being that of course the judge would know. That was what he was for. In those days there was a profound respect for the learning of the judges. The discussion among the students went on for some time. In later years valuable and important lectures were given in the School on the Burden of Proof and closely connected subjects, such as Presumptions of Law and Presumptions of Fact.

The contrast between the two methods became sharper. As time passed, fewer and fewer remained in Langdell's lectures. The number dwindled to seven or eight. But these were enthusiastic and persistent. They had no doubt as to the benefits derived. They argued the questions raised early and late, before and after the lectures. Some of the other students pronounced it a noisy nuisance. The library was sought by them to an unprecedented extent. They were never satisfied. It was said they criticized the opinions in actual court decisions in "a most disrespectful way." It was asked: Was law to be studied as a science, instead of what it actually was, a practical, every-day art? Were laboratory methods to be followed? What would be the end? Where could any one find out any rule of law if he pursued this iconoclastic way? Everything was made questionable and uncertain. What better course than to accept and remember a rule stated in the textbooks and said to be laid down by some court of last resort and approved by learned professors? The "new discovery" was visionary and unworkable.

But Langdell's followers were persistent in their course. The talks between these few and the many others, during the intervals between the lectures, were frequent and earnest. When asked why he so decidedly preferred the new way, one of these disciples replied that he felt freer, stronger, and better; that he got something which he found nowhere else; that there was no need to waste time in attending the reading of textbooks; that he had long before learned to read, and it was not necessary for him to go to a law school to have some one read to him; that he received more and had a keener interest in the Langdell way.

It will readily be understood that the diminution in the attendance upon Langdell's courses caused alarm. The other teachers had large numbers; he, extremely few. The contrast was painful.

This falling off was considered a demonstration of the failure of his methods; indeed, such was the well-nigh universal opinion among lawyers, professors, and students. But just after the middle of the year a strange thing happened. The attendance at his lectures began to increase, — slightly at first, to be sure, but it was a gain which grew larger slowly but surely. Those who returned became more and more interested as they continued their renewed attendance. Toward the end of the year quite a number, yet considerably less than half of those in the School, were present, and participated in the exercises now sometimes called "investigations." It should be added that these, having caught the spirit of the course, remained constant, and became strong advocates of the system. It was interesting to observe that they inquired about what had been done in their absence and sought the privilege of reading and in many instances copying the notes of those who had attended all of Langdell's lectures. It was noticeable that after reading the notes they endeavored to learn more fully of the matters briefly suggested in the short notes. One can easily understand what must have been the feelings of Langdell when the number fell to seven or eight, and also when the reaction came. Only a strong man of conscientious convictions could follow the chosen path under the discouraging conditions. And when the turn in his favor came, slight though it was, he unquestionably was greatly encouraged. He never exhibited any signs of discouragement or elation, but steadily pursued the course he had chosen. His lectures continued to be increasingly interesting.

It may be well to notice one of the outcomes of his method. For years there had been a "Parliament," which met once a week at night in the lecture room, where the students formed themselves into a representative body, choosing a speaker and practicing the ways of legislative bodies, giving attention especially to questions of parliamentary law. There had also been club courts, among them the Marshall Club, whose members, taking turns as counsel and judges, argued and rendered decisions upon law questions. These organizations were encouraged by the faculty. There had also been a moot court, as it was called, presided over by a professor or lecturer, who gave out the question to be discussed. Members of the school, usually two upon each side, argued before the presiding officer, who at the end of the arguments rendered a de-

cision. Sometimes a considerable number of students attended, but there was not a deep interest. It was found ofttimes that the results were not altogether satisfactory. It was said that the students participating were apt to be discursive, and too often inclined to rely upon oratory and striking phrases. In the year 1870–71 a new club, the "Pow Wow," was formed. It was composed of nine. One presided, acting as chief justice. Two argued the law questions, one on each side. The remaining six were puisne judges. After the arguments the counsel retired, the court advised, then, counsel being called back, rendered a decision, the judges delivering their oral opinions *seriatim*, the chief justice closing. The club met weekly at the rooms of the members, who took turns in the different capacities. Although this club still exists, it is not generally known that one of its original purposes was to practice parliamentary law; but this was never done, and the meetings were devoted exclusively to the consideration of law questions. Before the expiration of the year it became the custom to plead the case in writing, so as to develop the point or points of law thus evolved. This gave excellent practice in common-law pleading and was a most profitable procedure, even though it may have been somewhat technical occasionally. Once there was triumph when an *absque hoc* was achieved. The great advantage lay in a painstaking analysis of the facts in order, by eliminating immaterial matters, to develop in a clear-cut way the questions of law to be argued. The members of this club were attendants on Langdell's lectures. The deepest interest was taken. Able arguments were made, some of them equal to the best made in highest courts; and apparently as much was felt to be at stake as if the case were real. This practice, coupled with the mental discipline gained in Langdell's lectures, brought out the best there was in the men. A slovenly pleading or a careless argument — rare indeed — occasioned a sharp rebuke from the court through the chief justice. This developed a thoughtful and studious set of men, and formed in them habits of industry which followed them in their later years of active work in practice at the bar and on the bench.

Too much emphasis cannot be placed upon this early result of the Langdell method. His mind recoiled from temporizing or avoiding the real issue. He sought only the true solution, and when he had arrived at a conclusion, whether with reference to his method

of teaching or dealing with a law question, he adhered to it tenaciously, even in the face of apparent pecuniary loss to the School or severe condemnation for himself. The former he must meet when it came; the latter he bore patiently and without complaint. Any error on his part he was always quick to acknowledge; for in his single-minded devotion to the requirements of the task which he had undertaken he endeavored to ascertain and follow the course along which deep and incessant research and thought should lead his honest mind. His earnest endeavor was to lead his pupils to be as unerring as possible in their search for the truth. It has been said frequently, and on high authority, that he declared the law to be a science, and that it should be studied as such. Certainly his effort was to lead the pupil to analyze the cases and authorities and ascertain the principles involved so far as possible in the way science is studied. From remarks dropped by him occasionally outside the lecture room it is evident he felt from the nature of the subject that it could be resolved into comparatively few absolute rules.

The first year went along. His subjects were not completely covered. At the close the written examinations were held. Langdell's papers did not call for statements of the rules of law, but were designed to ascertain whether the students understood the principles sufficiently to apply them to supposed cases. Although they contained only matters which had been considered in his courses, they were pronounced "stiff" and even unfair. Many of those who had not attended his lectures failed to pass and were deeply disappointed, some openly indignant. They had passed the other examinations. It was discovered that a few who had not attended some of the other courses but had read the textbooks used, had passed the examinations in those courses, receiving excellent marks. Notwithstanding the success of these few, the former predictions of future disaster for the School were renewed with an increased force. The year ended with a general belief that the new way was impracticable and impossible.

Before the beginning of 1871–72 the announcement was made that the degree LL.B. would be given at the end of the school year to those who, having been in the School during the whole course of two years, should have passed satisfactory examinations at the end of the year in the prescribed studies of that year, and also

to those who, admitted one year in advance, should have been in the School one year and have passed satisfactory examinations in the prescribed studies of the second year, at the end of the year. Admission to advanced standing was allowed only on examinations in the prescribed legal subjects.

During the vacation interval between the end of the year 1870–71 and the beginning of the next, there was much discussion as to whether a method better than that followed by Langdell, and also better than that of the other professors and lecturers, could not be adopted. It was conceded at length that there was some good in Langdell's way, although at the same time it was asserted that there was greater good in the other ways. Combination of the two methods was urged: some reading or statement of summary from the textbooks, cases in law reports given to be examined by the students before the lecture, and some questioning and slight discussion. This had been tried in a way during a small portion of the past year. It was indorsed strongly by judges, practicing lawyers, writers on law, students who had not attended Langdell, and indeed by some who had. It was hoped that Langdell might see its advantages and make use of this better way. At the opening of the School year 1871–72 some adopted this intermediate or, as it was sometimes called, combination method, and some adhered to the old. There was much interest in what Langdell would do. Those who had thought that he would modify his method were disappointed. He made no change. This was attributed pretty generally to obstinacy; for it was felt, notwithstanding the enthusiasm of his followers, that the past year had demonstrated the folly of his way. He persisted, and indeed at no time made any modification whatever of his method of teaching, until in later years he was compelled to do so by reason of failing eyesight.

In 1870–71 the students without college or equivalent degree were in a slight majority. In 1871–72 they were in a minority.[2]

In 1871–72, as in the previous year, there were no regular classes, *i. e.*, no division into first and second year men as such. The attendance was large in the lectures of two of the professors and the five lecturers. In Langdell's the number was much smaller than in

[2] 1870–71, students holding degrees 76, without degrees 78
1871–72, " " " 78, " " 56
1872–73, " " " 64, " " 49

the others, although larger than during the year before. There was very little discussion in the courses save in his. New law clubs were formed on the same plan as the Pow Wow, omitting the parliamentary practice. Arguments were again had by the students before and after the lectures. Often the days were too short for these arguments and for the study necessary in preparation for the lecture to follow. Every proposition was subjected to severe scrutiny by the men. Langdell's lectures proceeded in the same way as before, but with increased interest, questioning, and discussions; the students were encouraged to form their own conclusions, being always advised to study court opinions given in the reports. The questions were squarely met. The men felt that all considerations pertinent to the subjects had been before them, and they learned to know that that was all to which they were entitled. It had been predicted that teaching in this way would lead to loose and irrelevant thinking. But Langdell had the rare gift of making remarks in a way which would indicate the real question, without however discouraging pertinent inquiry. And this was done quickly although quietly. So there was no appreciable loss of time. Instead of being indifferent the men were keenly attentive. They were impatient for the lecture hour to arrive. As has been said before, the results, as far as numbers in attendance was concerned, were greatly in favor of the other professors and lecturers. They were able men, highly distinguished in the law — including an ex-judge of the Supreme Court of the United States and leaders in the legal profession — and held in great respect by every one in the School. It should be borne in mind that the bench and the bar had always been looked to when a law teacher was required. But it was beginning to be predicted by a few that the time was coming when it would be realized that a most distinguished career on the bench or at the bar would not necessarily produce a successful teacher of law. Still, there were the ever present inquiries: Who is the most successful teacher? What is the best method? Very few indicated their preference for Langdell and his way. While he was well known by some eminent lawyers and profound students, yet he did not have the favorable reputation of the others. A justice of our highest court predicted that Langdell would ruin the School.

The weeks passed away. The year drew to its close. Then the

examinations came again, with a repetition of the experiences of the previous year. As in 1870–71, the results of the examinations decided the conferring or refusal of the degree.

An unprecedented occurrence happened before the beginning of the year 1872–73. While nearly all those who had completed the courses had severed their connection with the School, five of the students who had won the degree desired to remain a third year. Should they be permitted to do so? What should be their status? There was no third year's course. These five had attended Langdell's lectures. It had been decided to divide the School into two classes, — first-year students and second-year students. Without stating here the reasons which led the authorities to take this action, it is enough to say that they concluded to allow these five men to continue their studies in the School, and they were classified as Resident Bachelors of Law. This was a source of much satisfaction to the faculty, especially to Langdell; for even at this early time he earnestly desired a three years' course as a condition of the degree. His desires were not realized for some years. So this handful remained the third year, and pursued advanced courses.

Some of the club courts were remodeled. In the Pow Wow there were formed the Superior Court (first-year men), the Supreme Court (second-year men), with recourse as a last resort to the Appellate Court, the Pow Wow Chamber. These highest courts were favored with the presence and participation of eminent judges and lawyers, who gave their hearty approval to the proceeding. The writer cannot refrain from mentioning one, Mr. Justice Holmes, now of the Supreme Court of the United States, who was greatly interested, and gave time generously from his busy professional life to the club courts, and who contributed vastly to the advancement of the School, although few were aware of his unselfish devotion.

The teaching force was composed of two professors, one having resigned, and seven lecturers. There was no substantial change in instruction; yet there was some tendency toward more comment in the lectures. The general opinion of bench, bar, and students was still hostile to Langdell's method. The former predictions of disaster were repeated. It is well to examine briefly this condition.

In 1869–70 the number of students enrolled at the beginning of the year, as shown by the university catalogue, was 120; in 1870–71,

154; 1871–72, 134; 1872–73, first year 71, second year 37, resident bachelors of law 5; total 113. Thus, during the three years of his administration the number had steadily decreased until it had reached the lowest point since 1851–52, save in 1861–62 and 1862–63, two of the years of the Civil War. The comments on this decrease were many. Those who approved his method, while not disheartened, were greatly disappointed. The predictions of the critics were being realized. No excuses were or could be offered. The only reply was in fact no reply at all. It was at best an expression of belief that the future would bring better conditions. Furthermore, the money receipts had fallen away. How long would this continue? At this steady rate of reduction in numbers, how long would the School exist? To say that the university authorities, the alumni, and the friends of the School were alarmed is a mild expression of the feelings of those who had the interests of the school at heart. It was commonly thought that there should be a change in the administration and in the way of teaching; that teaching by cases should be given up and a more liberal — as it was termed — mode adopted in its stead. Again, it was urged that in the future a combination of the textbook and a few cases with much less discussion should be the basis.

The three years of endeavor to inaugurate a new mode of instruction had apparently ended in failure. The result of the long and patient trial of Langdell's system, instead of giving assurance of a fresh and vigorous life for the School, indicated rather a gradual approach toward its end. All agreed that the future of the School was at stake. This being the state of feeling, it was indeed bold if not reckless to continue longer the Langdell method, as it had come to be called. It took courage to decide to go on in this losing way, but most fortunately that decision was made and carried out. And contrary to the wishes of most of the sincere friends of the School, announcement was made accordingly, prior to the beginning of the year 1873–74.

There was deep interest amounting to anxiety as to the number of students who would enroll in that coming year. When it was found that it had increased from 113 to 138[3] there was a feeling of great relief. The turning-point had been reached. The School was not wrecked. This increase was most encouraging. The signs

[3] This is enrollment, not average attendance.

were favorable. Lawyers practicing in various parts of this country, and even beyond, sought the services of the students who had been developed in the School to aid them in investigating law questions. When from a lawyer in San Francisco a letter came asking urgently for the help of graduates of the School, Langdell was deeply gratified. Such facts, hardly appreciated at first save by extremely few, were to some extent the explanation of the increase. A young man who had faithfully and profitably followed the courses, could find a fairly lucrative position immediately after graduation. In after years this was well recognized. Furthermore, it was seen that graduates who started practice alone were successful in matters where legal research was required. Their opinions seemed sound and valuable. Briefs prepared by them were exhaustive and convincing, and recognized by courts to be of real assistance.

So the School continued to increase as the years went by. Langdell's system was adopted by professors and instructors, one after another, until it became the established method of instruction.

In June, 1873, while yet a student in the School, James Barr Ames was appointed assistant professor of law. This caused the most insistent remonstrance. A young man utterly inexperienced, who although admitted to the bar had never practiced law! It was unprecedented. Strong efforts were made to prevent confirmation. Happily they were unsuccessful. But so serious was the opposition and from such eminent and influential persons that it is most likely if assistant professorships had not been limited to the term of five years, the School would not have had the benefit of Ames's priceless services. To-day it is impossible to realize how there could have been any objection to this great teacher of law. To understand it, we must dismiss from our thoughts all he achieved after the summer of 1873, and also the successful teachings of the other young men who have followed him in this and other law schools. Consider it as a new and unheard-of venture. The legal profession as a rule is conservative, disliking radical changes. It always has recommended as teachers men who have had actual and successful experience in practice; and this because it has been the traditional way of selecting instructors. Educators usually are of the same mind. It must be confessed that the judgment of practically all would be unfavorable. In 1873 the feeling was dismay and grief. And yet the reason for the appointment was simple and plain to a few. Lang-

dell's view was that a successful practitioner would not necessarily be a successful teacher, any more than a successful teacher must prove to be a successful practitioner. In fact, they were two distinct professions. He considered himself a teacher of the principles of law. He distinguished between law and practice. The principles of the former were to be mastered and then applied. Practice he never undertook to teach. Although lectures on practice were given from time to time, he felt that a law school was no place in which to study it and that practice could only be learned by actual experience in practice. The different laws, rules, and customs in the various jurisdictions were so numerous and so contradictory that it would lead to confusion if it were undertaken. Ames had shown genius in his work in the School. Langdell came naturally to urge the appointment; for it was a result which naturally followed from his system of teaching. He felt that there was need of an instructor who by his work as a student had shown that he thoroughly understood and believed in his method of instruction. He had no doubt of Ames's success. That the choice was fortunate Ames's subsequent career demonstrated. This was a marked epoch in the life of the School. The subsequent wonderful success of this department of the university is well known. After condemnation, criticism, partial and at last entire adoption of his system, Langdell was entirely vindicated.

It was said that Langdell was not practical in his teaching. In fact he was unusually so. His frequent inquiries as to how the questions were raised in the different cases under examination brought out sharply practical aspects. While he disapproved instruction in the arts of practice, no one had a surer eye to the end sought. He did not teach equity until 1873-74. His course in this subject brought the best results ever achieved by him, and was as successful as his treatise is enduring. But he touched the practical key when he suggested to the students that they study the order and decree, and pointed out that the latter was the final goal in the suit in equity, and therefore should be examined with the utmost care. He referred to the success of Bell, the eminent English equity lawyer, and his skill in drafting orders and decrees, and recalled Lord Kingsdown's amusing comment that Bell "often deprived the conqueror of the spoil." [4]

[4] One wonders who drew the final decrees in the Northern Securities cases.

Much has been said and written concerning Langdell's system. At the outset and for a long time it was misunderstood, and consequently not appreciated. We have been considering his course during the early years of his professorship. Although his title was professor, he was and is spoken of as lecturer, instructor, teacher. He was not at all a lecturer. He did not read or deliver discourse, prepared or unprepared; neither did he speak or read as with authority. To formulate or announce rules of law to be accepted by the students formed no part of his method. To say that he was an instructor in the usual sense of being one less in rank than a professor, is incorrect. If we use it within the meaning of one giving information by doctrine or precept, it cannot apply to him. He is best described as a leader or director of the thought of the learner, although leadership or directorship was hardly to be detected in his manner. He seemed to influence insensibly the mental working of the students, while he appeared to be, and indeed was, working along with them. He had the rare faculty of exciting them to do for themselves. The impulse was his. But they felt that they themselves were the discoverers, and when once convinced of the soundness of the rule they sturdily maintained it, for it was their own. Consequently his courses were followed by intelligent, industrious, and earnest men with zeal. Joseph H. Choate said at one time, as is well known, that it made them obstinate and unduly conceited. But he knew and appreciated Langdell, and was interested in favor of his appointment in 1870. He more than once sought Harvard law graduates for his office; for he understood the distinction between persistence in well-studied and matured opinion, and obstinacy in adhering to an opinion simply because it had once been expressed. In time the students themselves came to appreciate the influence Langdell had exerted upon them. One quality was preëminent: he was inexorable in his search for the truth. Every phase of a question was examined. Of course among the men opinions were formed, suggestions made. But his way of testing the opinions expressed by the students was admirable. Reasons were given. Errors if existing were detected and disclosed. If, as rarely happened, he ventured a statement of his own, he welcomed and encouraged inquiry and tests by the men with a pleasure which they knew was sincere. "That man never deceives himself. He cannot. His mind is absolutely honest," was a comment made

during the year 1870–71. His students came to have a rare confidence in him. It was these qualities which in a large way led to his success.

It has been intimated that he was not a great teacher — but not, except at the very first, by those who had the great privilege of sitting under him in the early years of his professorship, when he was at his best. Later, as his eyesight became impaired, he was driven to give up the best of his method, and lectured. The profound depth of these lectures was not fathomed by many of the students, and those who did not grasp the full meaning of what he said felt that he was not a teacher. The few who appreciated the lectures did not agree with this view of Langdell, and the many who have read with admiration and profit his lectures when published in treatises in this country and elsewhere realize the debt which the profession owes him. It is plain this was a departure from his chosen method of instruction, but a departure forced by infirmity of his eyesight. Those who were close to him knew how great was his disappointment, when he was obliged to give up the system he had so faithfully worked out and followed. His solace was, as he intimated to these few, that there were among his colleagues those who had adopted and carried on successfully his way of teaching. The excellence of his work had been demonstrated. It was indeed to him an infinite satisfaction that his method was taken up and followed, not only at Harvard but in law schools and institutions where law is taught at home and abroad. He saw the Law School under his oversight, from a small, poorly arranged School open to all, fit or unfit, diligent or lazy, and granting degrees for residence only, located in a building not much larger than some of the present lecture rooms, grow to a large, well-organized institution crowded with men who had shown by educational tests their right to enjoy its advantages, who labored early and late with enthusiasm, and who were given the degree only after searching examinations, an institution in a new and commodious building, whose graduates were eagerly sought as aids by the legal profession.[5]

[5] The following table of attendance will show the growth of the School in numbers under the Langdell administration and afterwards. From 1817–18 to 1828–29 inclusive, the figures are taken from Charles Warren's History of the Harvard Law School and other sources. From 1829–30 the figures are from the annual reports of the presi-

That the library increased manyfold under his thoughtful supervision is now so well known that there is no occasion to say more concerning this branch of his career.

Mention has been made of the fears that the School would be ruined financially. It was said that he had no practical administrative sense, that he was a mere theorist. During the early years of his service these fears seemed justified. The income fell off. As has been said before, there was an insistent desire that there should be an increase in numbers and income. We need not go over in detail the financial story. It is enough to say that in 1870, when he

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dent and the treasurer and from the School records, and they represent the average number of students attending in the course of the year.

Year	Students	Year	Students	Year	Students
1817–18	6	1852–53	125	1887–88	225
1818–19	8	1853–54	148	1888–89	225
1819–20	11	1854–55	125	1889–90	262
1820–21	13	1855–56	117	1890–91	285
1821–22	13	1856–57	115	1891–92	370
1822–23	10	1857–58	143	1892–93	405
1823–24	8	1858–59	151	1893–94	367
1824–25	12	1859–60	161	1894–95	413
1825–26	13	1860–61	148	1895–96	475
1826–27	8	1861–62	103	1896–97	490
1827–28	8	1862–63	92	1897–98	551
1828–29	6	1863–64	129	1898–99	564
1829–30	24	1864–65	139	1899–00	613
1830–31	31	1865–66	177	1900–01	655
1831–32	40	1866–67	167	1901–02	633
1832–33	38	1867–68	125	1902–03	644
1833–34	51	1868–69	142	1903–04	743
1834–35	32	1869–70	122	1904–05	766
1835–36	52	1870–71	136	1905–06	727
1836–37	50	1871–72	122	1906–07	705
1837–38	63	1872–73	113	1907–08	719
1838–39	78	1873–74	131	1908–09	690
1839–40	87	1874–75	137	1909–10	765
1840–41	99	1875–76	173	1910–11	790
1841–42	115	1876–77	199	1911–12	809
1842–43	107	1877–78	196	1912–13	745
1843–44	127	1878–79	169	1913–14	696
1844–45	129	1879–80	177	1914–15	730
1845–46	145	1880–81	161	1915–16	791
1846–47	126	1881–82	161	1916–17	857
1847–48	126	1882–83	138	1917–18	297
1848–49	100	1883–84	150	1918–19	68 (before the Armistice)
1849–50	90	1884–85	156		
1850–51	100	1885–86	158		434 (after the Armistice)
1851–52	110	1886–87	188	1919–20	880

began, the funds were small in amount, and that in 1895, when he retired, the total was $360,000 invested and a cash surplus of $25,000. Excellence had received its reward. We may perhaps be excused if we make the statement that this man, "not practical," with "no business sense," left a considerable private estate which was the result of his own vigilance and good judgment.

It is almost impossible to refrain from a comparison between Langdell and Ames, his pupil and successor; but this must be deferred to some future time.

It has seemed strange that one not widely known in his profession, and in the face of such powerful opposition, should have been selected as the head of the Law School, and should have worked alone such a transformation in the School. Indeed, it was more than strange; it was impossible. He had no such thought. He did not bring about this change single-handed. He had constant assistance, such as is rarely given to any one engaged in a great and difficult undertaking. The system was his. To put into practice and continue that system unaided was beyond his or any one's power. The School needed a change. The heavy burden of selecting the instrument, as well as affording the necessary support, was mainly carried by another man.

Professor Langdell was not disposed to defend himself or his invention by argument against hostile criticism. He would not even argue on the subject with members of the governing boards or members of the law faculty. He was satisfied to leave the necessary current defenses and persuasions to President Eliot, and to await the verdict of the legal profession on the success of his disciples at the bar. President Eliot supported Professor Langdell's methods and measures with all his might; and the occasions were few on which these two men did not completely agree on any action either of them proposed. They both took confidently the necessary risks, and to them both the enthusiastic work of "the Langdell men" brought early and sufficient encouragement. As the years passed it was a satisfaction to them both to receive requests from other law schools for the temporary services of Harvard professors to exemplify the Langdell mode of instruction, which was being adopted by them, and to admit to the School well-trained students, some of them sons of eminent judges and distinguished personages in England and other foreign countries, who

sought and availed themselves of its advantages. These two men together, with the powerful assistance of Dean Ames, for whose appointment they were primarily responsible, put the School many years in advance of any similar institution, making it not only first among equals, but first with a long interval.

Franklin G. Fessenden.

GREENFIELD, MASS.

LANGDELL AND THE LAW SCHOOL

WHEN, in conversation, I first proposed to Mr. C. C. Langdell of the New York Bar that he become the Dane Professor in the Harvard Law School, I saw that the proposal attracted him strongly. He apparently wished to teach law rather than practice it, but to teach it in a new way. He called my attention to the obvious fact that he was a new kind of candidate for a professorship in the Harvard Law School, and expressed a good deal of doubt as to whether he could be elected. He was right in both respects; but clearly he had in mind some reform in legal education, some reconstruction of the Law School which I much wished to hear about, having some visions of my own about educational reform. He was distinctly attracted by the fact that it was the Dane professorship that was vacant, the professorship which Nathan Dane, eminent lawyer, legal author, and politician had founded by the gift of ten thousand dollars in 1829, and which Joseph Story had held for sixteen years thereafter. It was Dane, too, who in 1832 provided the growing school with an adequate building for the accommodation of its students and its library. When Dane founded his professorship, he provided that the lectures delivered on the foundation should be published. This provision Langdell thought a very wise one; and it accorded with his own purposes and anticipations. On the whole, my proposal fell in with Langdell's views of life, and he soon accepted the risks of the unusual candidature.

The Corporation consented, though with some reluctance, to elect Mr. Langdell Dane Professor, probably out of some general purpose to support their young President — all the members of the Board were old enough to be my father — whom they had placed in a difficult position in spite of much public and private criticism. The Board of Overseers in their turn consented to the election, but with even more reluctance, which was overcome mainly by the testimony of James C. Carter and Joseph H. Choate of the New York Bar to the effect that Langdell was a man of prodigious learning in the law and of remarkable industry, and that he had a legal mind of extraordinary acumen and sagacity.

WESTENGARD STROBEL AMES
BEALE J. B. THAYER GRAY

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GRAY SMITH WAMBAUGH

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The next step was to make him Dean of the School. A new statute required that the Faculty of each professional school should elect from among its members a dean, whose duty it should be to keep the records of the Faculty and prepare its business. At the Faculty meeting called for this purpose there were present President Eliot, Professor Washburn, who had been for fourteen years one of the three professors who really managed the School, Professor Nathaniel Holmes, who had been a professor in the School for only two years and had never taken any active part in its administration, and the new Dane Professor. So far as can now be ascertained, there never had been any Faculty meeting in the Law School with a record of proceedings. Professor Washburn testified that he had never heard of one. The intervention of the President in any Law School proceedings was also unexampled. A few months after I entered on the duties of President, I stepped into Professor Washburn's office in Dane Hall to ask him some question about the state of the School. At sight of me Professor Washburn held up both hands and exclaimed, "This is the first time I have ever seen a President of the University in this building." Presidents Kirkland and Quincy took some interest in the Law School because of their warm friendship for Judge Story; but no subsequent President and no earlier one had manifested an interest in the School. The meeting was rather an awkward one. The President stated its object — to elect a Dean. Now deans were rather recent creations in Harvard University. The Medical School had had a Dean since 1864; but his chief function was friendly and charitable intercourse with the students. Professor Gurney had just been appointed Dean of the College Faculty; but the nature of his functions and influence was not yet visible. Whether the functions of the Dean of the Law School were to be chiefly clerical and eleemosynary or not was not clear to Professors Washburn and Holmes; but at any rate neither of them desired the office. The only candidate seemed to be Professor Langdell, who had only just come to the School; but Professor Langdell himself said nothing. Professor Washburn, after explaining his complete ignorance of such matters, moved that Professor Langdell be elected Dean. This motion was carried by the votes of Professors Washburn and Holmes, Professor Langdell not voting. Then began in 1870 a process of conservative experimentation and construction in the Law School which is not yet finished. The phrase

in the new statute that the Dean should prepare the business of the Faculty gave the new Dean all the powers he needed.

The first subject Dean Langdell was called upon to deal with was the construction of a new curriculum for the School, divided into first and second year courses. To fill out this new programme required some additional courses, which the President and the Dean coöperated to procure. A similar reform was going on in the Medical School for like reasons. For three years the needed enlargement was procured by appointing eminent lawyers at the bar or on the bench to give instruction on special subjects in relatively short courses. Eight such lecturers were appointed during the first three years of the new régime, of whom three, Messrs. Bradley, Gray, and O. W. Holmes afterward became regular professors. Professor Langdell was distrustful of this method of increasing the instruction in the School; because he held that the fact that a man had become a distinguished lawyer or a respected judge did not prove that he knew how to teach law, or indeed that he could learn to teach law. He was inclined to believe that success at the Bar or on the Bench was, in all probability, a disqualification for the functions of a professor of law. He cordially assented, however, to the appointment of Messrs. Gray and Holmes; because he thought them genuine scholars in the law, capable both of discriminating research and of accurate exposition. President Eliot had seen at the Medical School that a distinguished practitioner of medicine or surgery might easily prove to be a poor teacher; although he might continuously interest medical students as an example of professional success. In the Law School he thought it prudent to provide for a few years the best possible examples of the old-fashioned method of teaching law, partly to break the force of the flood of criticism which was pouring in from members of the American Bar, but chiefly that the good students in the School might have the best possible opportunity to compare the old method with the new.

Professor Langdell's views concerning teachers of law received a striking illustration when in 1873–74 James Barr Ames, a recent graduate of the School, who had had no experience in practice, was appointed Assistant Professor of Law. Both the Corporation and the Overseers consented to this appointment with reluctance; and in all probability their consent was given only because the appointment was one limited by statute to a term of five years. The

President was prepared to support Dean Langdell in this bold adventure; because he had already seen that there were parts of professional teaching which young men could do better than old men, even though the young men had had but little professional experience. Before the expiration of the five years Mr. Ames was appointed full Professor of Law with general approbation, so conspicuous was his success.

As soon as Dean Langdell had completed his reorganization of the courses of study in the Law School, and put into operation his progressive programme covering two years, he turned his attention to the condition of the School's library, and set about, first, providing protection and safe management for the library, and, secondly, enlarging it. Langdell knew well the lack of supervision of the library before 1870. He had been himself its student-librarian for several years. He had himself used the books of the library with complete freedom, especially in the preparation of his valuable notes to Parsons on Contracts. He knew what extensive losses and damages the library had suffered because of the lack of supervision and the carelessness of the students. He regarded a well-selected, well-kept, and ample library as the one essential piece of apparatus for any law school, and especially for the Harvard Law School he hoped for. It had been the practice of the School to supply all the students gratuitously with copies of the textbooks they used. To abolish this costly practice was one of Langdell's first measures. He soon procured the services of a permanent librarian, who should be in constant attendance in the library. These measures for the protection and better ordering of the library were taken within a few months of Langdell's becoming Dean; but it was not till 1873, when Mr. John Hines Arnold became librarian, that the future of the Law School library conducted on Langdell's principles was assured.

As the case system came into use, another principle with regard to the conduct of the library had to be often applied. Duplicates had to be supplied of reports and other books which were in frequent demand. With a special appropriation made by the Corporation much was done during the year 1870–71 to improve the fittings of the room occupied by the library, to repair the bindings, and fill the numerous gaps in the series of important reports which the School had acquired during its first fifty years. When Mr.

Arnold became librarian in 1873 the librarian and the Dean worked together in perfect harmony, and indeed in the same spirit; and both lived to see the library increase greatly in number of volumes, serviceableness to the students and teachers, and pecuniary value.

To Professor Langdell books had a kind of sacrosanct character. They were to be handled carefully, preserved from dust and heat, and never defaced by pencil marks or words written on the margins of the pages. Mr. Arnold shared these sentiments of the Dean, especially in regard to books which had been obtained at high cost and could not certainly be replaced. These feelings were very much injured when certain teachers in the Law School, who were writing books, contracted the habit of sending books direct from the School library to one of the Cambridge printing offices, in order that the type might be set directly from the printed book, instead of from copies of the passages the authors proposed to use. Inevitably the books came back to the library with some of their pages defaced with black finger-marks and other smooches, and in some instances with pages torn. This state of things being reported by the librarian to the Dean, the Dean made some mild suggestions that the offending authors do as he had done, — have passages they wished to quote copied. When he found that this proposition was regarded by the offenders as unreasonable and was wholly ineffectual, he came to the President's office one morning with a grave aspect indeed, and in his official capacity requested my aid. He regretted the necessity of asking me to intervene; but the evil was intolerable. I had some difficulty in convincing the offenders that the Dean was right, and that his request should be respected. This is the only instance I can recall in which Dean Langdell procured the enforcement of his wishes by an exercise of the President's authority. In general, he eagerly desired to convince his associates and his students by argument that his way of looking at measures or doctrines was right or sound.

The instructive story of the success of Professor Langdell's method of teaching law has been well told by competent witnesses in the Centennial History of the Harvard Law School. Professor Langdell and I waited patiently, but anxiously, for the verdict. The number of students declined more than either of us had expected, and the demonstration of success achieved in prominent law offices and in practice by graduates of the School, who had en-

joyed Langdell's system and thoroughly utilized it, came more slowly than we had anticipated. On the other hand, that demonstration, when it came, was accepted by the legal profession with surprising readiness.

Other restrictive measures, such as the requirement for admission to the School of the degree of Bachelor of Arts or its equivalent, had to be postponed somewhat, but not for long. Dean Langdell thought that English and American law should be studied by itself without admixture of other subjects, such as government, economics, international law, or Roman law; but he also wanted every law student to have had a preliminary training in a good secondary school and a good college. When Professor Ames wished to include in the purchases for the library many books on Roman law, Dean Langdell acquiesced reluctantly, but was ultimately convinced that a great law library should include even that somewhat remote or detached subject.

During this long struggle with adverse circumstances, and especially with severe criticism of the case method and its results, Dean Langdell never cared to defend himself in print or by public speech. He knew that there was only one way to refute criticism, namely, to exhibit the professional success of his disciples. His silence did not mean lack of confidence in his method; far from it. Even when the failure of his eyesight compelled him to modify his method in his own classroom, he remained sure of the superiority of his original case method to any other, although he could no longer use it successfully himself.

Professor Langdell had, I think, no acquaintance with the edutional theories or practices of Froebel, Pestalozzi, Seguin, and Montessori; yet his method of teaching was a direct application to intelligent and well-trained adults of some of their methods for children and defectives. He tried to make his students use their own minds logically on given facts, and then to state their reasoning and conclusions correctly in the classroom. He led them to exact reasoning and exposition by first setting an example himself, and then giving them abundant opportunities for putting their own minds into vigorous action, in order, first, that they might gain mental power, and, secondly, that they might hold firmly the information or knowledge they had acquired. It was a strong case of education by drawing out from each individual student mental

activity of a very strenuous and informing kind. The elementary and secondary schools of the United States are only just beginning to adopt on a large scale this method of education, — a method which is not passive but intensely active, not mainly an absorption from either book or teacher but primarily a constant giving-forth. Professor Langdell's method resembled the laboratory method of teaching physical science, although he believed that the only laboratory the Law School needed was a library of printed books. His case system has been widely applied in this country to the teaching of clinical medicine and surgery, as a useful addition to the ordinary practice of teaching those subjects at the bedside of actual patients. The combination he used of the lecture and the recitation is capable of wide application in both primary and secondary schools and in colleges and universities. Indeed, the conference method used with small advanced groups in universities is an earlier example of his method, the merits of which have been recognized for at least a century wherever such groups have existed.

Langdell's disposition or character was singularly honest, just, candid, and serene; although he was also capable of indignation, quick and evanescent, or slow-gathering and persistent. He was a curious mixture of the conservative and the radical, having the merits of both. His relation to his wife, who was much younger than himself, and to her mother was so delicate and tender that it was a high privilege to witness it. About his own affairs he was reticent or reserved. Cut off in youth and manhood from the amusements and relaxations of most educated men, he took pleasure in the careful investment of his savings, as soon as he could make any. I was one of the few persons with whom he sometimes discussed investments; although he soon learned that, compared with him, I knew little about the subject. I heard from him something about farm mortgages in Iowa and other fertile western states. I found he held strong opinions about the security of the mortgage bonds of certain western railroads, and the insecurity of others, and that he enjoyed the careful researches which led him to these opinions. Such studies, however, were only the by-play of his mind. He was as successful there as he was in his other mental work; so that he left an estate whose amount surprised all his friends. He was as sagacious and far-seeing in this his sport as he was in his serious labors.

A striking characteristic of Professor Langdell was courage, both physical and moral. His moral courage was perfectly illustrated by his acceptance of the Dane professorship and his whole conduct as Dean of the Law School. His physical courage was illustrated by his going about alone on foot by day and by night in the streets of Cambridge, when he could see hardly anything, especially in the glare of bright sunshine. His daily walks between Austin Hall and his house were terrifying to onlookers, particularly after the advent of the automobile, but never to him. He would wait to cross the streets till his ears assured him that no horse or horse vehicle was very near; but his ears could not warn him in time of the rapid approach of a quiet automobile. Then he had to trust that the chauffeurs would see that a blind man was crossing the broad street. For several years he was quite unable to go alone on an unfamiliar path. This helplessness was a great trial to a man who had always been self-reliant in high degree; but he bore the calamity with unfaltering patience. As a teacher, Langdell was a great benefactor of the legal profession, and hence of every free and orderly community. As a man, he was worthy of all love and reverence.

Charles W. Eliot.

CAMBRIDGE, MASS.

THREE SUGGESTIONS CONCERNING FUTURE INTERESTS

1. The Transmission of Remainders

GEORGE GOLLADAY died in 1854, his widow Nancy, who died in 1907, surviving him by over half a century. By his will he gave his real estate to his wife and to her children after her death; "and if the said Nancy Golladay does not have children that will live to inherit said real estate, that said real estate, at the death of Nancy Golloday and her children, fall to Moses Golladay and his heirs." Nancy, then childless, remarried, and had a daughter who died before her mother. No children survived her. Moses Golladay died in 1855, leaving two children, William and Mary. William in 1900 made a warranty deed purporting to convey his interest in the real estate left by the will, and died intestate in 1904, leaving children as his heirs. The Supreme Court of Illinois holds that no title ever vested in William Golladay, the son of the remainderman named in the will, since he died before the life tenant. His children are not estopped by the covenants of his deed, for they do not assert title by descent from him, but as heirs of their grandfather Moses. Had William survived the life tenant, the warranty deed would have transferred the remainder, which in that event would not have passed to others under the terms of the will. Passing as it did to others, his deed conveyed nothing.[1]

This decision revives for Illinois, and for contingent remainders; the common-law rule regarding the descent of remainders and reversions, according to which he who claims by descent must make himself heir to him in whom the estate first vested by purchase,[2] ignoring the qualification added by Watkins that one who exercises acts of ownership shall be regarded as the purchaser of the reversion or remainder.[3] The rule that in the descent of a reversion and remainder there is no "mesne heir" but that the one claiming when the expectant estate vests in possession, claims as heir of the original

[1] Golladay *v.* Knock, 235 Ill. 412, 85 N. E. 649 (1908); Kales, Cases on Future Interests, 178.

[2] Watkins, Law of Descents, 118.

[3] *Ibid.*, 112, 118.

remainderman or reversioner, is the law in Maryland,[4] but has been changed by statute in other jurisdictions.[5]

The following remarks are intended to show why the older rule revived in part for Illinois is preferable to the rule which is at present more generally observed.

When a testator creates life estates with remainders, he does one of two things: he either gives property to a designated person or persons, subject to a life provision for some other person, or he makes a life provision and leaves it to be determined by circumstances existing at the end of the life where the property is to go. These two alternatives represent the real difference between vested and contingent remainders; "vested subject to be divested," when applied to an estate in expectancy, is in reality contingent; and the treating of such a remainder as vested subject to be divested, for the purpose of avoiding certain restrictions or liabilities attaching to contingent remainders,[6] is a mere conventional mode of construction that should not mislead or confuse us. Whenever a testator makes a disposition dependent on circumstances existing at a future time, he seeks to project himself and his will, as far as feasible, to that point of time; if he could, he would only then make his dispositions. It may safely be assumed that he does not intend to benefit persons who would not be the natural beneficiaries of his will were his will made at the later point of time. Results contrary to his presumed interest may, however, easily follow, if remainders are treated as vested, or if contingent remainders are treated as descendible, devisable, or alienable. It will then not infrequently happen that his property at the time to which he desires to project his control will pass to persons who are strangers to him. So in the very common case that the remainderman dying in the life of the life tenant leaves a wife or husband as heir, or that the remainder descends to a child and the child later dies, leaving the other parent

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[4] Barnitz's Lessee *v.* Casey, 7 Cranch (U. S.), 456, 469, 470 (1812); Buck *v.* Lantz, 49 Md. 439 (1878); and in Georgia, Payne *v.* Rosser, 53 Ga. 662 (1875).

[5] Cook *v.* Hammond, 4 Mason (U. S.), 467 (1827); Kean's Lessee *v.* Roe, 2 Harr. (Del.) 103 (1835); Hillhouse *v.* Chester, 3 Day (Conn.), 166 (1808); Cote's Appeal, 79 Pa. St. 235 (1875); Early *v.* Early, 134 N. C. 258, 46 S. E. 503 (1904); Hicks *v.* Pegues, 4 Rich. Eq. (S. C.) 413 (1852). See the citations in note in KALES, CASES ON FUTURE INTERESTS, 184.

[6] Nonalienability: Blanchard *v.* Blanchard, 1 Allen (Mass.), 223 (1861); 5 GRAY, CASES ON PROPERTY, 2 ed., 77; destructibility: Doe *v.* Martin, 4 T. R. 39 (1790); 5 GRAY, CASES ON PROPERTY, 2 ed., 55.

as its heir. To avoid this result, the Supreme Court of Illinois has in several cases interpreted a remainder not only as contingent, but as contingent upon the remainderman outliving the life tenant. So in the common form of limitation "to my wife for life, upon her death to my children, and if any of my children die leaving issue either before me or before my wife, then the issue of the child so dying shall take the share which the parent would have taken if living at her death," the children take remainders contingent upon their surviving the wife,[7] with the result that if a child leaves husband or wife, but no issue, the husband or wife will take nothing. In most states there is probably no hard and fast rule preventing courts from seizing upon slight forms of expression to read a contingent remainder as contingent upon the contingent remainderman surviving the life tenant, and particularly the provision in favor of his issue, should he die before the life tenant, will aid that construction. The trouble is that such a construction would aid the testator's scheme only if he had made express provision for issue of the contingent remainderman, for normally the testator desires that a contingent provision for a relative should inure to the benefit of the latter's children should he die prior to the happening of the contingency. The rule in *Golladay* v. *Knock* is an additional aid in carrying out the testator's presumable intent, for while it lets in the son of the contingent remainderman, it does not let in either the son's wife or the son's mother, should the son die before the interest vests in possession. If, however, the testator's presumable intent is to shut out all those who are strangers to his blood, the rule of *Golladay* v. *Knock* does not go far enough, for it lets in the contingent remainderman's wife, so far as she is her husband's heir. The shutting out of all strangers requires either an explicit appropriate provision or a statute.

An abstract direction inserted in a will that a remainder shall not, while it is still an interest in expectancy, pass to strangers, would of course be futile; a testator can neither alter the legal course of descent nor render property inalienable. The only common-law exception to this rule is the estate tail. At common law a remainder in tail will prevent the property from passing out of the stock

[7] Cummings *v.* Hamilton, 220 Ill. 480, 77 N. E. 264 (1906); KALES, CASES ON FUTURE INTERESTS, 175; People *v.* Byrd, 253 Ill. 223, 97 N. E. 293 (1912); KALES, *ibid.*, 477.

by any testamentary act; and before the remainder has vested in possession, the remainderman in tail cannot dispose of his interest (by common recovery or its statutory substitute) without the concurrence of the life tenant. In this country the entail legislation of the state where the land is situated will have to be carefully examined, and in most states it will be found that the remainder in tail is not available for the testator's purpose. In any event it would not serve in case of personal property.

What the testator can do is to create alternative contingent limitations. This is what the Supreme Court of Illinois did for the testator in *Golladay* v. *Knock*. It construed the contingent remainder in fee as a remainder in the alternative to the person named or to his heirs at the time of the vesting of the possession. Under the facts of that case the construction operated to exclude the stranger claiming under the nonsurviving heir of the remainderman. Had the remainderman, however, died leaving no children, but a widow surviving the life tenant, she would under the law of descent of Illinois have been the heir to the extent of one half of the property. The form of limitation "to B or his heirs" is therefore not adequate. The proper form is: *to A for life, remainder to B and his heirs, or if B dies during the life of the life tenant, to such heirs of B as would be also heirs of my own, had I died immediately after the life tenant.*

If this form is substituted for "to A for life, remainder to B and his heirs" (instead of for: to A for life, remainder to B *or* his heirs), the testator should bear in mind that he turns a vested into a contingent remainder, and that the latter may violate the rule against perpetuities where the former would not. That simply means that a testator, intent upon pushing his tying-up scheme to the furthest limits, will encounter legal obstacles of one sort or another. In the ordinary case of life estates confined to the first generation, the testator has his free choice between vested and contingent provisions following the life estate, and the natural desire of keeping remainders from passing to strangers can be given full effect.

The difficulty arising from the rule against perpetuities would be avoided by a statutory rule for the transmission of remainders. The rule would be substantially as follows: "A remainder given to a relative shall before it vests in possession be transmissible by intestacy, will, or gift in the nature of a provision, to such heirs of the

remainderman only as would be also heirs of the original testator or donor had he lived until after the death of the life tenant. This rule shall apply by analogy to personal property and to executory limitations." This rule would, in accordance with the presumed intent of the giver, exclude also the adopted child of the remainderman.

A gift in remainder not to a relative may well be left to explicit testamentary provision, if testator desires to keep it in the stock of the donee. If a statutory provision were deemed desirable, it would have to restrict transmission to descendants of the remainderman.

The suggested rule would not touch alienation *inter vivos* except where it is a gift in the nature of a provision. In so far as speculative dispositions are considered undesirable, they may be left to any existing restrictive rules, and they would in any event be effectually discouraged by the risk purchasers would run of not outliving the life tenant; a disposition in the ordinary course of business or management, however, which may be effected by remaindermen joining with life tenants, so far as it is possible now, ought not to be rendered impossible, but on the contrary facilities should be created where they are now lacking.

A rule restricting the transmissibility of remainders would in a manner revive the policy of the doctrine of "last seised" in the common law of descent. So long as the law did not recognize husband or wife as possible heirs, and so long as here was a rule forbidding the passing of property from the paternal to the maternal stock and *vice versa*, that doctrine had an extremely limited application. The rule now suggested would in one sense be of much wider application, for it would include devise as well as descent, and personal as well as real property, but it would recognize, as the common law recognized, that so long as a person has a merely expectant or future interest in property, the expectancy is not an asset to which persons having no blood connection with the source of the property have any equitable claim. If it be suggested that the rule would operate harshly with respect to a widow, let it be remembered that dower presupposes seisin, and that the law makes no provision for the widow of a son dying before his father, out of the father's estate, while it makes such provision for the issue of the son.

2. The Separability of Limitations

Gray, in The Rule Against Perpetuities, says:

"Very often, indeed generally, a future contingency which is too remote may in fact happen within the limits prescribed by the Rule against Perpetuities, and a gift conditioned on such a contingency may be put into one of two classes according as the contingency happens or does not happen within those limits; but unless this division into classes is made by the donor, the law will not make it for him, and the gift will be bad altogether."[8] And he illustrates: "Thus a gift to B. if no child of A. reaches twenty-five is bad, although A. dies without children; while if the gift over had been if A. dies without children, or if his children all die under twenty-five, then on A.'s death without children, the gift over would have taken effect."[9]

The rule may be English law; but it is submitted that it is a most unreasonable rule. The rule should be that if a remote limitation not only in its terms logically includes a valid limitation, but also leaves no doubt whatever as to what the valid limitation thus included is, and the valid limitation plainly carries out the testator's intent, the valid limitation will be given effect.

To apply this rule, not only should, in the instance given by Gray, the gift over be given effect if A died without children, but also if his children all died under twenty-one. "To the unborn son of A., but if he dies under twenty-five, over" — clearly includes: but if he dies under twenty-four, under twenty-three, under twenty-two, or under twenty-one; and if he dies under twenty-one, the gift over is valid. If he dies over twenty-one, the gift, unless it can be saved on some other principle, is invalid, because remotely taken away from him, and therefore remains in him. There cannot be the slightest difficulty of validating a limitation under the circumstances indicated. It is conceded that there is no sense in the English rule. Jessel, M. R., says: "This is a question of authorities." "The law is purely technical."[10] Why should American courts follow such a rule? Simply from that sense of reverence which, as has been happily said, is always at the service of the incomprehensible. The English Real Property Commissioners recommended a change

[8] § 331.
[9] § 332.
[10] Miles *v.* Harford, 12 Ch. D. 691, 703, 704 (1879); quoted, Gray, The Rule Against Perpetuities, § 349, note.

of the rule by statute, but it can be changed by the simple process of logical reasoning.[11]

The rule may be put in this way: If I am promised more than can be validly promised, I am at least entitled to as much as can be validly promised if it can be separated from the excess. In New York a person having wife or children may not give by will to charity more than one half of his estate; should he give all, is not the charity entitled to one half? The law expressly so provides, but any court would give this construction to the statute. An option unlimited in time was held void in *London & S. W. R. Co.* v. *Gomm.*[12] The option there was bargained for in 1865; it was sought to be exercised in 1880, *i. e.*, within sixteen years. In *Barton* v. *Thaw*,[13] the option was sought to be exercised after thirty years. The option would have been good if in terms limited to twenty-one years; why should it not have been sustained for that period? It is not convincing to answer that the courts cannot arbitrarily fix upon twenty-one years, since the parties might have stipulated for a life in being plus twenty-one years. Business transactions, particularly where a corporation is concerned, are normally measured by years and not by lives, and the reasonable period for which powers of sale unlimited in time are sustained is twenty-one years.

In some classes of cases it may be doubtful whether the court should cut down rather than annul. If I have bargained for more than I can validly take, I may be entitled to less, but I am not necessarily required to take less, and this works both ways, if the transaction is a two-sided one. If a lease is good only for twenty-one years, the question whether a ninety-nine year lease should be sustained for twenty-one years must depend upon a variety of circumstances, the amount of rental, covenants, etc. In a sense a court in such a case must speculate as to intent, and this the English courts seem averse to doing, while American courts are more liberal. It is true that the Supreme Court of the United States has a rule similar to the English rule now under discussion against separating the valid from the invalid aspects of a statute where both aspects are covered by the same phrase;[14] but in these cases

[11] See Gray, *ibid.*, p. 600, note 3.

[12] 20 Ch. D. 562 (1881).

[13] 246 Pa. 348, 92 Atl. 312 (1914).

[14] United States *v.* Reese, 92 U. S. 214 (1875); Trademark Cases, 100 U. S. 82 (1879); Employer's Liability Cases, 207 U. S. 463 (1908).

the court was justified in refusing to give to a legislative policy effect in a more restricted field of application than Congress had specified. The rule is not one of mechanical operation, and where a statute contains in different clauses valid and invalid provisions, courts regularly inquire into the presumable legislative intent. It seems that in England, where a testator separates his gift into parts, and then gives part under valid, part under invalid limitations, the valid part is sustained without question,[15] whereas an American court will ask whether by reason of the entirety of the testator's scheme the invalid part does not also vitiate the valid.[16] The American rule is sensible, although it cannot be applied without speculating as to testator's intent.

The conclusion must be in favor of a judicial power of cutting down unlimited or excessive periods to the permissible limit. The trouble with the doctrine of separable limitations is the failure to distinguish between that which is matter of clear logical implication and that which is not. It is common sense to assert that a gift over upon dying under twenty-five may be sustained as a gift over upon dying under twenty-one; it does not follow that a gift to an unborn person at twenty-five can be sustained as a gift to an unborn person at twenty-one. When Sir William Grant suggested[17] that it might have been as well if the courts had held a limitation transgressing the limits to be void only for the excess where that excess could be clearly ascertained, he lent some countenance to a theory of cutting down which certainly cannot be supported as a mere matter of logic. A gift at twenty-one is not logically included in a gift at twenty-five, because the former is a larger gift, and the more is not included in the less.

Is it possible to sustain the gift to the unborn son of A at twenty-five by making it read as follows: "to the unborn son at twenty-five if he reaches that age within twenty-one years from his father's death"? This is clearly included in the contingency of his reaching twenty-five at any time. The usual objection to this method of validation is that the law permits the selection of any life as a "criterion" life. If Herbert Spencer could by his will postpone the ultimate vesting of interests to the death of the last survivor of

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[15] Cattlin *v.* Brown, 11 Hare, 372 (1853).

[16] Barrett *v.* Barrett, 255 Ill. 332, 99 N. E. 625 (1912).

[17] Leake *v.* Robinson, 2 Meriv. 363 (1817).

the descendants of Queen Victoria living at his death, why should not a similar implication be made in favor of every will? The objection is specious, and it can be readily understood why, with the latitude permitted by the law as to the selection of criterion lives, the cutting down process suggested might have appeared to the courts to be too conjectural.

Still in practically every case the criterion life naturally suggests itself. "To the unborn son of A at twenty-five;" not only would A's life be the one to be naturally selected, but it is also the normal expectation that A will not die until his children are four years old. It would be a simple matter to frame a rule to the effect that any gift to unborn persons at an age older than twenty-one shall be construed as implying the condition that such age shall be reached within twenty-one years from the death of the parent (if a relative of the testator), through whom they are related to the testator. It would not have been impossible for the courts to imply such a condition; it would certainly be possible for the legislature to imply it without in any way altering the substance of testator's gift. Such an implied condition would also save many gifts to classes now held invalid. It would be a more satisfactory way of saving them than through construction. I do not subscribe to the rule that "every provision in a will or settlement is to be construed as if the Rule [against Perpetuities] did not exist, and then to the provision so construed the Rule is to be remorselessly applied." [18] If this is the rule of the English law, it is an unreasonable rule which American courts should be slow to follow. However, if a gift to a class under ordinary rules of construction violates the rule against perpetuities, it is a very dubious remedy to save the gift by cutting down the class; for this means benefiting some members of the class at the expense of others, while the invalidity of the entire gift may let in all the members of the class as heirs or next of kin. In which way the most equitable result will be reached may depend entirely upon circumstances unforeseeable at the time of testator's death. The choice is therefore between adhering to established rules or permitting the courts to speculate upon probabilities, and the established rule is preferable. But I am inclined to think that the courts should have the right to limit a class to the members existing at testator's death, notwithstanding a postponed period of distribution, where the

[18] Gray, The Rule Against Perpetuities, 2 ed., § 629.

admission of possible additional class members would produce invalidity, and where by reason of the age of parents the testator may be presumed to have contemplated no additional members. Of course, if the rule is altered so as to admit additional members of the class without any risk of invalidity, so much the better.

Wherever reasonable construction can save a gift which, under purely technical rules of construction, violates the rule against perpetuities, the gift ought to be saved. If the law is now otherwise, it ought to be changed; if the English law is otherwise and is nineteenth-century law, it should not be followed. But an alteration of the rule so as to make it operative only for the excess of a gift above the permissible limit will probably be found to be an impossibility. The result would be an arbitrary enlargement of gifts quite outside of testator's intent. The illustrations given in Gray, sections 886–893, will make this clear. The only method of cutting down limitations is upon the theory of severability, and that method ought to be applied more liberally than it is.

Even under the law as it stands it is open to a testator to guard against the construction that has proved fatal to so many wills. The following provision would serve the purpose:

"All limitations in this will contained shall be deemed to be conditioned upon their taking effect as vested interests or estates in possession or remainder within twenty-one years from the death of the last survivor of the beneficiaries named in this will [or of the descendants of my parents][19] who shall be living at my death."

3. The Policy against Remoteness

Most of the highly developed systems of law have some policy against perpetuities; but in the systems other than that of the common law it is a policy confined to testamentary or family settlements of property made for successive generations, and to dispositions in mortmain. The common law of England alone formulates the policy as a general rule of the law of property. However, not only does the rule find its common application in family settlements, but as soon as we pass beyond these we encounter uncertainty, if not confusion. Confined to family settlements, the

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[19] The words in brackets would operate to save gifts to grandchildren, nephews or nieces, and grand-nephews or grand-nieces whose parents are not beneficiaries under the will.

question whether the rule is one against remoteness or one against inalienability is of little practical importance, for remote limitations normally result in inalienability, and inalienability was undoubtedly the inconvenience against which the rule was primarily directed. When we come to other arrangements involving remoteness, the remote interest is normally alienable, or at least releasable, and we search laboriously for a reason that will explain why a remote option is against public policy. Professor Gray suggests, that property that is liable to be divested by a remote contingency is not apt to be used to the best advantage of the community.[20] This is true only if we understand "remotely contingent" as meaning contingent for a period lasting until a remote time, not if it means contingent at a remote time; yet the rule applies also in the latter sense, although it is clear that an option exercisable only at the end of fifty years leaves the property freer than an option exercisable at the end of twenty-one years.

In a family settlement we are also ordinarily relieved from making a distinction between vested and contingent, for remote limitations are normally affected by the chances of birth and death, and hence contingent; but in a remote option the difference between vested and contingent becomes extremely fine.[21] In *Woodall* v. *Clifton* [22] the court, in holding a remote option void, does not refer to the difference between vested and contingent, but merely to all executory limitations other than those subsequent to an estate tail.

According to Gray,[23] a devise to A and his heirs, to begin from a day fifty years after the testator's death, is too remote, although admittedly there is nothing contingent about it. What other than a technical reason can be given for such a rule? It can be defeated by a slight change of form, for the validity of a devise to A and his heirs subject to a term of fifty years given to my executors, is unquestioned.

A devise to A and his heirs, to begin from a day fifty years after my death, is a form of disposition that is not likely to occur. A similar devise to an institution or charity is less improbable and deserves consideration. There may be a sound legal policy against remotely effective dispositions; if so, such policy should not be

[20] GRAY, THE RULE AGAINST PERPETUITIES, 2 ed., § 603 *f*.

[21] *Ibid.*, § 230 *a* and *b*; Barton *v.* Thaw, 246 Pa. 348, 357, 92 Atl. 312 (1914).

[22] [1905] 2 Ch. 257.

[23] GRAY, THE RULE AGAINST PERPETUITIES, 2 ed., § 201, note.

bound by the technicalities of the rule against perpetuities. There should be a clear realization of the substantial difference between vested and contingent; between a rule of property and a rule of contract, and between individual and corporate transactions.

Assuming a devise to some university to begin after fifty years to be void for remoteness, the same would be true of a bequest of a library, the same of a fund consisting of securities, whether already existing or directed to be set aside. How about a legacy of $10,000? The rule against perpetuities is a rule of property, not of contract.[24] A promise to pay $10,000 fifty years after my death would generally be regarded as good. It may be said that a promise is a pure obligation, while a legacy is enforceable in equity and can be collected by making the residuary legatee refund after the executor has paid him. But in this respect the position of the creditor is even better than that of the legatee. The effect of the law of administration of decedent's estates is to transform every pure obligation after the death of the obligor into an obligation of a specific fund, namely, the estate left by the obligor. In reason, therefore, legacies and promises to pay should stand on the same footing as far as the question of remoteness is concerned. The difference between property and contract breaks down.

We are not prepared to declare a promise payable fifty years after the death of the promisor to be void; for that would nullify every promise to pay at a time later than twenty-one years from date, considering that it is not certain that the promisor will live for an hour after making the promise. We should therefore be prepared to sustain also a legacy payable fifty years after death.

Practically, under the law of administration, the executor would have to make the same provision in both cases. He would have to set apart a sum sufficient to produce in fifty years the required amount. That would be equivalent to setting aside a fund for accumulation. A question would arise under statutes against accumulations: can a thing be done by indirection which cannot be done directly? In England the Thellusson Act makes in this respect a distinction between debts and ordinary legacies, permitting accumulations for the payment of the former; but in America debts and legacies would generally be subject to the same rule. Assuming that accumulation is not forbidden by law, may the legatee or

[24] Worthing Corporation *v.* Heather, [1906] 2 Ch. 532.

creditor on general principles demand immediate payment of the sum, which by accumulation would produce the amount of his claim, considering that he represents the only interest that is to be protected? The law of Illinois gives every holder of a nonaccrued claim after the death of the debtor the right to immediate payment on deduction of an appropriate discount. A legacy payable thirty years after testator's death was sustained in Illinois as a vested interest;[25] but there the interest was given with the principal and directed to be paid annually, and the court refused to enter upon the question of the postponed payment of the principal.[26] It thus appears that the postponed or remote promise has its problems and difficulties, and the striking fact is that they apply to legacies and to debts alike. No similar difficulty would arise in case of a gift of a library or a gift of a piece of land, to become effective fifty years after death. In other words, where remoteness creates embarrassment, we have no clear rule against remoteness, while we have one where it serves little purpose. What do we gain by asserting the rule as a rule of property and denying it as a rule of contract? It would be better to have no rule at all against remote executory interests which are free from any contingency.

The importance of any such rule is much diminished by the fact that remoteness without some element of contingency is of infrequent occurrence outside of corporate transactions. An individual promise to pay at a time beyond the period of the rule against perpetuities is even more rare than a legacy remotely postponed without any contingency. But we approach a much more practical question when we come to consider contingent promises. A covenant for title and an indemnity bond are obligations of common occurrence; they are apt to be made for contingencies without limit of time, and it has never been suggested that the rule against perpetuities should apply to them.

But how does such an obligation operate after the death of the obligor? That depends upon the state of the law of the administration of decedent's estates with regard to contingent claims against the estate. And here we enter upon a somewhat obscure field. Under the English law the executor is normally liable indefinitely;[27] he can discharge himself by refusing to pay legacies

[25] O'Hare *v.* Johnston, 273 Ill. 458, 113 N. E. 127 (1916). [26] *Ibid.*, 478.

[27] But note the application of the Trustee Act, 1888, § 8, sub-sec. 1 (b).

except under order of a court, and the liability then devolves upon legatees or distributees.[28] In America the matter is governed in a general way by statutory provisions regarding presentation of claims against the estate, which however frequently neither mention nor fit contingent claims. In some states contingent claims are required to be presented within the brief period prescribed by law (often only one or two years). Such is the law of California.[29] This mode of provision will be presently considered. In other states the provisions of law are such that it may well be contended that contingent claims require no presentation, since there is no conceivable method indicated of dealing with them. Illinois is in that category. In that state the executor's liability ceases, the same as in England, after he has distributed under the order of the court.[30] It has been said that in Illinois the statute is interpreted to mean that the claim is barred also against the legatees or distributees.[31] But this seems to be an error. The opinion in *People* v. *Brooks* [32] may seem to lend some countenance to this view; but if the facts of the case are examined as they appear from the Appellate Court Reports,[33] it will be found that the claim was on a guardian's bond and that the infant became of age before the expiration of the period of administration, so that the obligation of the bond was then broken, and the claim should have been presented as a matured or accrued claim against the estate of the surety; failure to present discharged the distributees, and the claim was absolutely barred.

It must frequently happen that a contingent liability first becomes an actual liability long after the obligor's death and after his estate has been distributed to next of kin and legatees. They may therefore for years be liable to a remotely contingent obligation, of the existence of which as likely as not they will be entirely ignorant. If there is a policy against remoteness, it operates with the same force whether it is a question of a liability to incur a pecuniary obligation or of losing some specific property. If there is a rule of law in the latter case, why not in the former? The law

[28] *Re* King, [1907] 1 Ch. 72.
[29] Code of Civ. Proc., §§ 1648, 1651.
[30] Snydacker *v.* Swan & Co., 154 Ill. 220, 40 N. E. 466 (1895).
[31] Professor Warren in 32 Harv. L. Rev. 315, 321, 332.
[32] 123 Ill. 246, 14 N. E. 39 (1887).
[33] 15 Ill. App. 570 (1884).

may well permit a person to bind himself contingently for the period of his life or a shorter period, or to bind himself and his estate for a reasonable time; but to bind indefinitely successive generations of beneficiaries by will or intestacy does not seem reasonable.

But can any remedy be suggested that will relieve the situation? If the rule against perpetuities were applicable, it would mean that every contingent liability would have to be expressly limited to a period, the most natural maximum limit of which would be the life of the obligor and twenty-one years thereafter. Under a theory of separability of limitations an unlimited contingent obligation might be reduced to the same limit. A statutory rule establishing a like maximum limit for noncorporate obligations would therefore not seem inappropriate.

Were such a statute proposed, conservative legal sentiment might be expected to protest against so radical an innovation upon the law of warranty and suretyship.

Let us then consider a much more plausible proposition and see how it would operate. In California, and in the states following her legislation, a contingent claim must be presented against the estate of the obligor in due course of administration; otherwise it will be barred. A similar requirement was recently proposed in Illinois in connection with a comprehensive revision of the law of administration but failed to become law. If the claim is presented, the court is in a general way required to make provision for meeting or protecting it, and the claim will be saved in the absence of other arrangements.

Under legislation of this kind the practical result will be in the great majority of cases that the contingent liability will be extinguished at the end of the period prescribed for presenting claims. For contingent claims of the perpetual kind, such as warranties and indemnity assurances, while as yet contingent, are very apt to appear to their holders as unsubstantial; the beneficiaries rarely watch them with any care because they do not expect they will ever have occasion to have recourse to them; hence only in the rarest cases will they be presented. An almost inevitable default will have the practical effect of a limitation. If the contingent claim is presented, the court may require next of kin or legatees to renew the obligation to the extent of the assets received by them respectively. That would at least have the advantage of placing them

on their guard; otherwise the liability would remain as it is now. However, in jurisdictions in which the necessary facilities exist, the court might well consider the transformation of the obligation into an insurance policy, to the acceptance of which in lieu of his personal claim the obligee might be expected to consent readily. Such a course would result in the final extinguishment of all individual liability.

The simple provision requiring the presentation of contingent claims will therefore in normal cases have the effect of reducing the life of such claims to the life of the obligor and a brief period thereafter. In view of this, a direct change of the law to the same effect can hardly be pronounced revolutionary. It would simply serve to express the true nature and function of contingent obligations. If they are not by their terms or by the nature of the subject matter limited to brief periods, they should be treated as purely personal liabilities. If conditions call for indefinite or perpetual warranties or indemnities, that need should be met by corporate insurance or suretyship.

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LIABILITY FOR SUBSTANTIAL PHYSICAL DAMAGE TO LAND BY BLASTING— THE RULE OF THE FUTURE[1]

Class 1. Where defendant's blasting has cast rocks or other tangible substances upon plaintiff's premises, thereby doing substantial physical damage to land or buildings, it is now commonly said that defendant is absolutely liable, and that it is unnecessary to prove negligence.

This view is now commonly asserted by the great weight of authority. A leading case is *Hay* v. *Cohoes Co.*[2] Authorities likely to be cited to-day as sustaining this view are given in the footnote.[3] Whether the result reached in these cases could be better rested on another ground will be considered later.

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[1] Notice that we are here considering only instances where blasting inflicts substantial physical damage on land or buildings. We are not now dealing with cases where continuous annoyance renders land untenantable or materially reduces the rental value, but without doing physical damage to the land itself or the buildings thereon.

[2] 2 N. Y. 159 (1849).

[3] Hay *v.* Cohoes Co., 2 N. Y. 159 (1849); Tremain *v.* Cohoes Co., 2 N. Y. 163 (1849); Scott *v.* Bay, 3 Md. 431, 446 (1853); Adams *v.* Sengel, 177 Ky. 535, 197 S. W. 974 (1917) (citing earlier Kentucky cases); Bessemer Coal Co. *v.* Doak, 152 Ala. 166, 44 So. 627 (1907); Central Co. *v.* Vandenheuk, 147 Ala. 546, 41 So. 145 (1906); Somerville, J., in *Ex parte* Birmingham Realty Co., 183 Ala. 444, 448, 63 So. 67 (1913); Mulchanock *v.* Whitehall Mfg. Co., 253 Pa. St. 262, 267, 98 Atl. 554 (1916); s. c. L. R. A. 1917 A, 1015; Johnson, J., in Knight *v.* Donnelly, 131 Mo. App. 152, 163, 110 S. W. 687 (1908); Henry Hall Sons Co. *v.* Sundstrom Co., 138 App. Div. 548, 123 N. Y. Supp. 390 (1910); affirmed without opinion in 204 N. Y. 660, 97 N. E. 1106 (1912); Interborough Rapid Transit Co. *v.* Williams, 168 N. Y. Supp. 688 (1918); E. T. Bartlett, J., in Page *v.* Dempsey, 184 N. Y. 245, 251, 77 N. E. 9 (1906); Forrester *v.* O'Rourke & Co., 48 Misc. 390, 95 N. Y. Supp. 600, 601 (1905); Vann, J., in Sullivan *v.* Dunham, 161 N. Y. 290, 300, 55 N. E. 923 (1900) (as to reasons for decision in Hay *v.* Cohoes Co.).

In Gourdier *v.* Cormack, 2 E. D. Smith (N. Y. Com. Pleas), 200 (1853), one effect of the blasting was to split out (force out?) rocks three or four feet under the foundation of plaintiff's house. The judgment below for defendant was reversed. It is not entirely clear whether the splitting out of the rocks was the result of concussion (result of the force of the blast) or was caused by pieces of rock thrown by the blast. The defendant's liability, whether his conduct was negligent or not, seems rested on the authority of Hay *v.* Cohoes Co., 2 N. Y. 159, 162 (1849).

The authorities favoring the view asserted in Class 1 do not restrict its application to damage done to land or buildings. It has been regarded as extending to cases where missiles thrown from a blast have hit, or damaged, an individual who was upon land where he had a right to be. This includes not only an individual who was upon his own land, but also a laborer at work upon his employer's premises,[4] or a traveler upon the highway struck by blasting done by defendant upon his adjacent premises.[5]

Class 2. Where substantial physical damage is done to plaintiff's land or building by vibrations or concussions due to blasting, but no tangible substance is thrown upon plaintiff's premises, it has been held by some authorities: first, that the case differs in principle from Class 1; and second, that the defendant is not liable unless negligence is proved.

This view is sustained in New York. The leading case is *Booth* v. *Rome, etc. R. R.*,[6] and it is supported by the authorities given in the note below.[7]

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[4] St. Peter *v.* Denison, 58 N. Y. 416 (1874).

[5] Sullivan *v.* Dunham, 161 N. Y. 290, 55 N. E. 923 (1900); Wright *v.* Compton, 53 Ind. 337 (1873).

In Turner *v.* Degnon, etc. Co., 99 App. Div. 135, 90 N. Y. Supp. 948 (1904), "a traveler was struck while upon a city street by a stone thrown by a blast set off by a contractor engaged in constructing an underground railway," described as "a public improvement authorized and directed by the legislature." (See statement of case in 1 BOHLEN'S CASES ON TORTS, 611, note 2.) The Appellate Division held, by three judges against two, that the plaintiff could recover.

In Miller *v.* Twiname, 129 App. Div. 623, 114 N. Y. Supp. 151 (1908), defendant was a contractor building a highway. Plaintiff, who was bringing him coal, was hit by a blast while on the highway, which was then in the lawful possession of the defendant. Held, that plaintiff, at the time he was injured, was not a traveler upon a public highway within the rule declared in Sullivan *v.* Dunham, 161 N. Y. 290, 55 N. E. 923 (1900).

[6] 140 N. Y. 267, 35 N. E. 582 (1893), overruling the decision in the lower court, 44 N. Y. St. 9 (1892).

[7] The Booth case has repeatedly been reaffirmed in New York. See, for instance, Holland House *v.* Baird, 169 N. Y. 136, 62 N. E. 149 (1901). For authorities in other states, approving the Booth case, see Simon *v.* Henry, 62 N. J. L. 486, 41 Atl. 692 (1898); Cherryvale *v.* Studyvin, 76 Kan. 285 (1907), Smith, J.; *ibid.*, 287–288; Rost *v.* Union Pacific R. R., 95 Kan. 713, 714, 149 Pac. 679 (1915), West, J. (In both these Kansas cases the plaintiff recovered. The court held that the evidence in each case justified the jury in finding negligence.) Simpson, J., in Bessemer, etc. Co. *v.* Doak, 152 Ala. 166, 177, 44 So. 663 (1907).

In New York, where distinction between the Hay case and the Booth case is still upheld, troublesome questions sometimes arise as to which of these two precedents

Outside of New York, the cases are not unanimous. The weight of recent authority is against the New York view that Class 2 is distinguishable in principle from Class 1. Cases to this effect (contrary to the New York view) are cited in the note below.[8]

Query: Whether the rejection of the view taken in the Booth case, as to the alleged distinction between Class 2 and Class 1, necessitates the rejection of the further view taken in the Booth case — that negligence is the test (the requisite) of liability in cases of vibration and concussion. This question will be considered later.

Is the above distinction between Class 1 and Class 2 tenable?

We think not. Defendant's liability (the test of liability), whatever it may be, should be the same in both cases. This is upon the assumption that there is no difference between the two classes, except the one therein indicated: *viz.*, as to the manner in which the damage is inflicted by the blast.

In the leading case of *Booth* v. *Rome, etc. R. R.*[9] the principal reasons [10] given for distinguishing Class 2 from Class 1 are: that in

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govern a new case; as to when it may be said that the blast has thrown tangible substances upon the plaintiff's premises. Compare, for instance, Wheeler *v.* Norton, 92 App. Div. 368, 86 N. Y. Supp. 1095 (1904), with Derrick *v.* Kelly, 136 App. Div. 433, 120 N. Y. Supp. 996 (1910), and Adler *v.* Fox, 74 Misc. 483, 132 N. Y. Supp. 302 (1911). See also Conron *v.* Fox, 90 Misc. 425, 153 N. Y. Supp. 425 (1915), and Conwell *v.* Degnon & Co., 154 N. Y. Supp. 182 (1915).

[8] Fitzsimmons & Co. *v.* Braun, 199 Ill. 390, 65 N. E. 249 (1902); Colton *v.* Onderdonk, 69 Cal. 155, 10 Pac. 395 (1886); Watson *v.* Mississippi, etc. Co., 174 Iowa, 23, 156 N. W. 188 (1916); Louden *v.* City of Cincinnati, 90 Ohio St. 144, 106 N. E. 970 (1914); Patrick *v.* Smith, 75 Wash. 407, 134 Pac. 1076 (1913); Longtin *v.* Persell, 30 Mont. 306, 76 Pac. 699 (1904); Schade, etc. Co. *v.* Chicago, etc. R. R., 79 Wash. 651 (1914); Parker, J., *ibid.*, 658-659.

[9] 140 N. Y. 267, 35 N. E. 592 (1893).

[10] In Hill *v.* Schneider, 13 App. Div. 299, 43 N. Y. Supp. 1 (1897), the decision in the Booth case is explained as being based on special concessions made by defendant during the argument of that case, in substance: (1) that the blasting was necessary in order to adapt defendant's premises to a lawful use, and (2) that it was conducted with due care. As to the alleged concessions, see 140 N. Y. 267, 269, 35 N. E. 592 (1893), and Andrews, C. J., 274; and comments of Rumsey, J., in 13 App. Div. 299, 305, 306, 43 N. Y. Supp. 1 (1897).

See also discussion in later part of this article as to the contention that the blasting was "necessary," and that the defendant, in blasting, was only making a reasonable use of his land (was only reasonably exercising his rights as a landowner). In regard to the latter position Mr. Lewis says that the decision in the Booth case "would seem to be fairly open to criticism." See 9 LEWIS, AM. R. R. AND CORP. REP. 103.

Class 2 the damage is "consequential"; that there is "no technical trespass"; and that there is "no physical invasion." [11]

None of these reasons are satisfactory.

The term "consequential damage" is an equivocal one. On the one hand, it is sometimes used to denote damage which is so remote a consequence of an act that the law affords no recovery for it. It is thus used as practically "synonymous with non-actionable." On the other hand, it is used to denote damage which, though distinctly traceable to defendant's tort as the effective cause, did not follow immediately upon the doing of the act complained of; what Sir William Erle aptly terms "consequential damage to the actionable degree." [12] In the latter case, as in the present instance, the term "merely indicates that the action must be in Case rather than in Trespass." [13]

"For it can hardly be supposed that a man's responsibility for the consequences of his act varies as the remedy happens to fall on one side or the other of the penumbra which separates trespass from the action on the case." [14]

"The phrase 'consequential damage' has never served any useful purpose except in marking a distinction between damage which was formerly recoverable in an action of case and that which was formerly recoverable in an action of trespass." [15] Mr. Salmond [16] says that the term is now "merely an inheritance from an obsolete system of procedure." [17]

If the term is appropriate here, it must be taken as used in the second sense above stated; and as denoting "consequential damage to the actionable degree." But we submit that the term does not apply at all to a case like *Booth* v. *Rome, etc. R. R. Co.* We concur with the view expressed by Macomber, J., in the report of the Booth case in the court below,[18] that the damage here was direct, and not in any sense consequential.

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[11] 140 N. Y. 267, 279, 280, 35 N. E. 592 (1893).

[12] See Brand *v.* Hammersmith & C. R. Co., L. R. 2 Q. B. 223, 249 (1867).

[13] 10 Col. L. Rev. 465, 467.

[14] Holmes, The Common Law, 80.

[15] 17 Col. L. Rev. 383, 388.

[16] Torts, 4 ed., 184, note 7.

[17] See also discussion by present writer: 15 Col. L. Rev. 13–14; 17 Col. L. Rev. 383, 388; 25 Harv. L. Rev. 223, 250–251; Eaton *v.* B. C. & M. R. R., 51 N. H. 504, 519–521 (1872). See also Doe, J., in Thompson *v.* Androscoggin R. R. Co., 54 N. H. 545, 550–554 (1874). And see 10 Col. L. Rev. 465, 467.

[18] See 44 N. Y. St. 9, 11 (1892).

As to the objection that there is "no technical trespass:"

This objection seems founded on the theory that there is a distinction in principle, as to liability for damage to real estate, between cases where the remedy at common law, if there were any remedy, would have been an action of trespass, and cases where that form of action would not have been an appropriate remedy under the old common-law system of procedure. It was formerly supposed that if the facts of a case (excluding defenses) would have constituted a *primâ facie* foundation for an action of trespass, then the defendant could not clear himself by proving an entire absence of fault on his part.[19] But this view no longer prevails in England since the decision in 1890 of the case of *Stanley* v. *Powell*,[20] and it had previously been rejected in this country.[21] Hence the rule of liability for blasting cannot depend on the question whether an actual physical trespass upon the *res* has been committed; nor is it material to inquire whether "the vibratory effects of blasting cannot constitute an actual trespass." [22]

To this objection — that there is "no technical trespass" — it would be a sufficient general answer to say that substantive law is no longer "controlled by the forms of procedure." To determine a question of substantive law it is not now necessary to discuss the refined technical distinctions by which the common-law system of forms of action was "perplexed and incumbered." Professor Maitland says that now "the attention is freed from the complexity of conflicting and overlapping systems of precedents and can be directed to the real problem of what are the rights between man and man, what is the substantive law." [23] But notwithstanding Professor Maitland's sweeping statement, this desirable result is not yet completely achieved. Unreasonable though it may be, it must be admitted that sometimes "the substantive obligations imposed by law are still influenced by the old forms." [24] Indeed, Professor

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[19] See 1 STREET, FOUNDATIONS OF LEGAL LIABILITY, 74, 75.

[20] L. R. [1891] 1 Q. B. 86.

[21] See Brown *v.* Kendall, 6 Cush. (Mass.) 292 (1850); Brown *v.* Collins, 53 N. H. 442 (1873); 1 STREET, FOUNDATIONS OF LEGAL LIABILITY, 80.

[22] See Willard Bartlett, J., in Sullivan *v.* Dunham, 10 App. Div. 438, 442, 41 N. Y. Supp. 1083 (1896).

[23] MAITLAND, EQUITY AND FORMS OF ACTION, 375.

[24] ROBERT CAMPBELL, PRINCIPLES OF ENGLISH LAW, 425.

Maitland himself says: "The forms of action we have buried, but they still rule us from their graves." [25]

The objection that there is "no physical invasion" is sufficiently answered in the following quotations from recent opinions.

The New York court attempts a distinction

"by pointing out that, in the Cohoes case and in others following it, the injury was done by casting debris upon the plaintiff's premises; while in cases of the kind we have now before us, the injury complained of results from concussion of the atmosphere, or from vibrations of the earth. The former, it is said, constitutes a physical invasion, a trespass, upon the plaintiff's property, while the latter does not. The deduction is neither obvious nor convincing. Physical invasion of the property of another does not necessarily imply an actual breaking or entering of the plaintiff's close by the wrongdoer in person, or casting upon his premises any particular kind of missile or other particular thing or substance. The employment of force of any kind which, when so put in operation, extends its energy into the premises of another to their material injury, and renders them uninhabitable, is as much a physical invasion as if the wrongdoer had entered thereon in person and by overpowering strength had cast the owner into the street. . . . It has often been held that the casting or discharge of noxious vapors or gases into the air, which, spreading abroad, invade the home or place of business of another, constitutes an actual wrong. In a legal sense how does an injury inflicted by the act of one who casts a rock against his neighbor's house or destroys his property by turning loose the ungoverned energy of water in motion differ from an injury caused by one who voluntarily imparts destructive force and energy to the air, or who, by the use of the almost limitless powers of modern explosives, creates a little earthquake?" [26]

"It is insisted by counsel for defendants in error that because no rock, soil or debris was actually thrown upon plaintiff's premises there was no actual trespass. . . . We are unable to distinguish between a case where a fragment of rock or a portion of the soil is thrown onto an adjoining property and a case where the force of an explosion is transmitted through the soil and substratum, jarring, cracking and breaking it, destroying the cistern and foundation of the building and wrecking the building

[25] MAITLAND, EQUITY AND THE FORMS OF ACTION, 296. Compare Professor J. W. Salmond, 21 L. QUART. REV. 43, quoted in 30 HARV. L. REV. 245. And see further discussion in a later part of this article.

[26] Weaver, J., in Watson *v.* Mississippi, etc. Co., 174 Iowa, 23, 31, 32, 156 N. W. 188 (1916).

itself by a concussion of the air around it, thereby doing far more injury than a fragment of rock could do. It is a distinction without a difference. . . . Is not a concussion of the air and jarring, breaking and cracking the ground with such force as to wreck the buildings thereon as much an invasion of the rights of the owner as the hurling of a missile thereon? If there is any difference whatever, it is purely technical, and ought to find no favor with the courts. Certainly the application of a force sufficient to crack the surface of the land to such a depth as to destroy the foundations of buildings, to break windows, and throw down chimneys, is a direct invasion of property rights." [27]

"We see no valid reason why recovery should be permitted for damage done by stones, or dirt thrown upon one's premises by the force of an explosion upon adjoining premises, and not be permitted for damage resulting to the same property from a concussion or vibration sent through the earth or the air by the same explosion. There is really as much a physical invasion of the property in one case as there is in the other. The force does the injury in both cases, and the fact that it causes stones or other *débris* to be thrown upon the land in one case, and in the other only operates by vibrations or concussions through the earth or air, seems to us to be immaterial.

"It is perhaps true that an action of trespass could not be maintained in the latter case, because there would be no breaking of the close by the entry of any person or thing; but there would seem to be no reason, on principle, why an action of the case could not be maintained when the injury is really of the same character and is caused by the same powers intentionally set in motion by the defendants, knowing that they will be projected through the earth and air and may cause damage to the plaintiff's property. In such case, one who thus causes dangerous forces to pass through another's property should be held liable for the damage directly resulting therefrom. And there is no more reason for requiring that negligence be shown in the one case than in the other." [28]

Thus far, we have been considering the question whether there is, or should be, any difference between the liability of a blaster in Class 1 and in Class 2. And our conclusion is, that there should be no distinction in liability between the two classes if there is no difference between the two except the one above stated; *i. e.*, as to the manner in which the blast affected the land.

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[27] Donahue, J., in Louden *v.* City of Cincinnati, 90 Ohio St. 144, 158, 159, 106 N. E. 970 (1914).

[28] Johnson, J., in Hickey *v.* McCabe, 30 R. I. 346, 355, 356, 75 Atl. 404 (1910). See also Gose, J., in Patrick *v.* Smith, 75 Wash. 407, 134 Pac. 1076 (1913); Holloway, J., in Longtin *v.* Persell, 30 Mont. 306, 313, 76 Pac. 699 (1904).

But back of this question whether there is any substantial distinction between the two classes there lies a more fundamental inquiry. Assuming that one and the same rule of liability should apply to both the above cases, what should that rule be and upon what principle should it be based? Shall it, in both cases, be the rule of absolute liability — the blaster acting at peril; or shall there be liability only in case of negligence? If the latter, the negligence may consist (1) in making an attempt to blast at all, at the place and time in question; or it may consist (2) in negligently conducting blasting operations when undertaken at a proper time and place.

The alternative result is correctly stated in a note in 27 HARVARD LAW REVIEW,[29] where the annotator, after saying "There seems no sufficient reason for distinguishing these two classes of cases," adds:

> "and the law should either treat blasting as an action at peril and give a recovery in both, or it should deny it in both and only apply the test of negligence aided by the doctrine of *res ipsa loquitur*." [30]

In attempting to decide which of these alternative views should be adopted, two things should be noticed:

First: An attempt to extract an answer from the language of the authorities is made difficult by the fact that the law is now in a state of transition; and that the old phraseology is still used by some courts which are really adopting as their *ratio decidendi* more modern views.[31] The literal language at present used by some judges may fail to indicate their tendency to change the law, or to suggest the probable rule of the future.

Second: A decision as to which of the above alternative views should be adopted is not now, in the great majority of cases, of such vital importance to the plaintiff as it might once have been. If the defendant is *not* held to act at peril, yet a plaintiff who has a meritorious case can generally succeed on the ground of negligence,

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[29] Pages 188, 189.

[30] Of course, the blasting differs from an accidental explosion of a powder magazine in this: that in blasting the explosion is intentionally produced. Compare EARL, COM., in Losee *v.* Buchanan, 51 N. Y. 476, 480 (1873), and Vann, J., in Sullivan *v.* Dunham, 161 N. Y. 290, 294, 55 N. E. 923 (1900). But, though the defendant intends to produce the explosion, he does not, in the cases now under discussion, "intend," in the sense of "desiring," to produce the damage which actually results to the plaintiff.

[31] "Legal phraseology is, however, the part of the law which is the last to alter." MAINE, ANCIENT LAW, 1 Eng. ed., 337–338.

which is a modern conception with a scope and effect much enlarged in these later years.

Formerly, a plaintiff might have been allowed to recover against a faultless defendant, on account of the fact that the plaintiff's property which was damaged consisted of real estate. He might, perhaps, have recovered not only on account of (or irrespective of) the dangerous instrumentality used by defendant, but also (as a distinct ground) on account of the peculiar protection which the law was supposed to afford to the ownership and occupancy of real estate. This is spoken of as "the sanctity which the ancient common law attached to ownership and occupancy of real property," and especially "to one's dwelling-house."[32] But to-day the better view is that an unintentional entry upon, or damage to, real estate is not generally actionable in the absence of fault. In some quarters entitled to respect[33] "there is still a tendency to hold that, when real estate is damaged or invaded, the old rule of absolute liability remains unchanged." But the weight of modern authority is otherwise.[34]

The history of law as to the former absolute liability in the absence of fault, and as to the present general requirement of fault as a requisite to liability, can be stated very briefly. Speaking generally, the modern law is a reversal of the ancient law.

In old days it was the general rule that a man, though acting entirely without fault, was liable for the damaging consequences of his innocent acts. In some cases where this doctrine worked extreme hardship, an innocent actor was exonerated; but these instances of nonliability were exceptions.

At the present time, it is the general rule that fault is requisite to liability. In rare instances the law imposes liability in the absence of fault; cases where a defendant is held to have "acted at peril." But these instances are exceptions to the general rule which requires fault as an element of liability.[35]

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[32] See 1 THOMPSON ON NEGLIGENCE, § 764.

[33] See MARKBY, ELEMENTS OF LAW, 3 ed. § 711.

[34] See discussion and citations in article by present writer, 30 HARV. L. REV. 319, 321–323; and SALMOND ON TORTS, 4 ed., 186.

[35] These exceptions are attempted to be justified on the ground that they are cases of "extra hazardous uses." It is alleged that there are various classes of extra hazardous acts "which are performable only at the peril of the doer." Some prominent in-

The earlier and later standards are thus compared by Professor Ames:

"The early law asked simply, 'Did the defendant do the physical act which damaged the plaintiff?' The law of to-day, except in certain cases based upon public policy, asks the further question 'Was the act blameworthy?' The ethical standard of reasonable conduct has replaced the unmoral standard of acting at one's peril." [36]

The gradual adoption of the modern and now prevailing doctrine — that fault is generally a requisite element of liability in tort — has naturally induced an examination of the essence of fault in the legal sense. And this has given rise to the modern conception of a particular fault which formerly was hardly mentioned; *viz.*, negligence.

The three following paragraphs, I, II, and III, are here substantially reprinted from an article by the present writer on "Tort and Absolute Liability" in 30 HARVARD LAW REVIEW.[37]

I. The doctrine that a man, in certain cases, acts at peril and is absolutely liable for nonculpable accidents is, as we have already said, a survival from the early days when *all* acts were held to be done at the peril of the doer. When the courts, in more recent times, were gradually coming to adopt the doctrine that fault is generally a requisite element of liability in tort, the law on the subject of liability for negligence was not so fully developed as it is now. If the wide scope and far-reaching effect of the law of negligence had then been fully appreciated, it is quite

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stances (including blasting) are enumerated in 30 HARV. L. REV. 319, 329–334. This doctrine imposing absolute liability for nonculpable accident — this holding that a man in certain cases acts at his peril — is regarded unfavorably by some of the best modern text writers. (See SALMOND ON TORTS, 4 ed., Preface v; POLLOCK'S LAW OF TORTS, 10 ed., 505, 511, 671, note *s*; 1 STREET, FOUNDATIONS OF LEGAL LIABILITY, 84, 85.) One objection to this classification is found in the difficulty of drawing "the line between the danger which calls for care and the 'extra' hazard." "There are, as yet, no unanimously approved rules or criteria" as to this subject. (See Professor E. R. Thayer, 29 HARV. L. REV. 801, 811.) The highest English court some fifty years ago, in Rylands *v.* Fletcher, L. R. 3 H. L. 330, 339–340 (1868), undertook to lay down the so-called Blackburn Rule. But this rule "has not met with universal and cordial approval by English lawyers" (see SALMOND ON TORTS, 4 ed., Preface; POLLOCK'S LAW OF TORTS, 10 ed., 671, note *s*); and it is "rejected by what we consider the decided weight of American authority." See 30 HARV. L. REV. 409, 413, note 14.

[36] 22 HARV. L. REV. 99.

[37] Pages 409, 413–415.

probable that the courts would not have thought it necessary to retain any part of the old law of absolute liability for application in certain exceptional instances.

II. There was "a time when the common law had no doctrine of negligence." It has been said that, in the earlier stages of the law, "there is no conception of negligence as a ground of legal liability." In Holdsworth's "History of English Law,"[38] the author speaks of "the manner in which the modern doctrines of negligence have been imposed upon a set of primitive conceptions which did not know such doctrines." Mr. Street says that the law of negligence "is mainly of very modern growth." "No such title is found in the year books, nor in any of the digests prior to Comyns (1762-67)."[39] Sir Frederick Pollock[40] says: "The law of negligence, with the refined discussions of the test and measure of liability which it has introduced, is wholly modern; . . ." Professor E. R. Thayer[41] says "that law" (the law of negligence) "is very modern—so modern that even the great judges who sat in *Rylands* v. *Fletcher* can have had but an imperfect sense of its reach and power." ". . . the law of negligence in its present development is a very modern affair, rendering obsolete much that went before it."[42]

III. At the present time it is generally unnecessary, in order to do justice to a plaintiff, to adopt the doctrine of acting at peril.[43] Professor E. R. Thayer says: ". . . the law has at its hands in the modern law of negligence the means of satisfying in the vast majority of cases the very needs which more eccentric doctrines are invoked to meet."[44] If the case is a meritorious one and proper emphasis is laid on the test of "due care *according to the circumstances*," then "the theory of negligence" will generally be "sufficient to carry the case to the jury." "How powerful a weapon the modern law of negligence places in the hands of the injured person, and how little its full scope has been realized until recently, is well shown by the law of carrier and passenger. . . ."[45]

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[38] Vol. 3, p. 306.

[39] 1 Street, Foundations of Legal Liability, 182.

[40] 27 Encyclopaedia Britannica, 11 ed., 66.

[41] 29 Harv. L. Rev. 805.

[42] *Ibid.*, 814.

[43] In some American cases the courts, while deciding in favor of the plaintiff, have approved the Blackburn Rule in Rylands *v.* Fletcher. But in the great majority of these cases the facts did not call for an application of that rule; the defendant being liable on other grounds, frequently on the grounds of his negligence. See Professor Bohlen, 59 Univ. of Pa. L. Rev. 423, 433-439. See *post*, that by the weight of modern authority the decision for plaintiff in the case of Rylands *v.* Fletcher itself might have been based on negligence.

[44] 29 Harv. L. Rev. 815.

[45] *Ibid.*, 805.

At the present time, in an action for blasting, if the courts apply the modern law as to negligence, a plaintiff who has a meritorious case can generally recover without calling in aid the old rule of absolute liability (acting at peril).[46]

The plaintiff is likely to derive material assistance from two doctrines, one as to the amount of care required from defendant, the other as to the method of proving negligence.

Assuming that there are no degrees of care *as matter of law*, yet there must obviously be a great difference in the amount of care required in various cases *as matter of fact*. A jury will be told, and will usually find, that the amount of care required *in fact* will increase in proportion to the danger to be apprehended in case of neglect. Hence they will generally find that the amount of care required of a blaster is *in fact* very great.[47]

But not only is great care in fact required of the blaster. In addition the plaintiff is much aided, as to the method of proving defendant's absence of care, by the application of the doctrine of *res ipsa loquitur*.

This rule, taken literally, and without explanation, is liable to misapprehension.

The doctrine does not dispense with the requirement that the party who alleges negligence must prove the fact, but relates only

[46] The plaintiff could not now safely rely on the former theory as to the sanctity of real estate (see *ante*, and see 30 HARV. L. REV. 319, 321–323), but he generally does not need help from that theory.

[47] Denver Electric Co. *v.* Simpson, 21 Col. 371, 41 Pac. 499 (1895), was an action to recover for negligence in the use of electricity. The trial judge charged, as matter of law, that the defendant, though not an insurer, was bound to "the highest degree of care, skill and diligence" in the construction and maintenance of its lines and in carrying on its business. There was a verdict for the plaintiff, which the Supreme Court refused to set aside. The court held, in substance, as follows: The instructions were erroneous as matter of legal theory or phraseology; but no injustice was done in this case. Colorado does not recognize degrees of negligence or of care, *as matter of law*. The jury should have been instructed that the defendant company was bound to exercise "that reasonable care and caution which would be exercised by a reasonably prudent and cautious person under the same or similar circumstances"; with the additional instruction that (under the foregoing standard) the care (required in fact) increases as the danger does. But the jury, if so instructed, would have unquestionably found that this standard (of the care of the ordinary prudent man under the circumstances) required, in fact, the exercise of the highest degree of care. Hence no harm was done by the judge's erroneously telling the jury that *the law* required the highest degree of care, when the jury (under the ordinary prudent man standard) would have found, *as matter of fact*, that ordinary prudence would have required the exercise of the highest degree of care in this case.

to the mode of proving it. The isolated fact that an accident has happened does not afford *primâ facie* evidence that the accident was due to the negligence of the defendant. But if the accident, viewed in the light of the surrounding circumstances, is one which "commonly does not happen except in consequence of negligence," then, if no explanation is offered, the jury *may*, not *must*, find that it was due to the negligence of the defendant. There is, however, no presumption of law, or fact, to this effect. The existence of negligence is "an inference which the jury are authorized to draw, and not an inference which the jury are compelled to draw."

This rule, even on a very conservative statement of it, would permit a jury to find the fact of negligence (a *primâ facie* case of negligence) in a very large proportion of instances of damage due to the blasting, and the jury would often so find.

One reason why juries are permitted to apply, and are generally willing to apply, this rule in blasting cases, is found in the great difficulty, not to say impossibility, of proving specific acts of negligence on the defendant's part. By the explosion, "every trace of the material used and the methods employed are usually blown out of sight, and beyond all possibility of direct proof, except by witnesses who will be naturally unwilling, if not hostile."[48]

The adoption by the courts of another rule favorable to plaintiff is not impossible; *viz.*, shifting upon the defendant the burden of proof as to care. Sir Frederick Pollock, in his draft of an Indian Civil Wrongs Bill, section 68, proposed a provision that a person keeping dangerous things is bound to take all reasonably practicable care to prevent harm, and is liable as for negligence to make compensation for harm, unless he proves that all reasonable practicable care and caution were in fact used.[49] In his work on the common law of torts, in discussing cases like *Rylands* v. *Fletcher*, he says:

> ". . . one does not see why the policy of the law might not have been satisfied by requiring the defendant to insure diligence in proportion to the manifest risk (not merely the diligence of himself and his servants, but the actual use of due care in the matter, whether by servants, contractors, or others), and throwing the burden of proof on him in cases where the matter is peculiarly within his knowledge." [50]

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[48] See Stiles, J., in Klepsch *v.* Donald, 4 Wash. 436, 439, 30 Pac. 991 (1892).

[49] Pollock on Torts, 6 ed., 623–624.

[50] Pollock on Torts, 10 ed., 511.

As to the present tendency of the courts in regard to imposing absolute liability in exceptional cases of nonculpable accidents:

On the one hand, there is a judicial tendency to extend (to recognize more fully) the obligation of using care; to call some conduct negligent which would not have been held so a century ago.

On the other hand, there is a tendency to restrict or deny liability in the absence of negligence or wrongful intention. Professor Wigmore,[51] speaking of the principle enunciated by Blackburn, J., in *Rylands* v. *Fletcher*, says:

". . . the tendency may perhaps be said to be in many states to restrict to as few as possible the classes of situations to be governed by the principle. An example of the latter attitude is found in the masterly opinion of Mr. Justice Doe, in *Brown* v. *Collins*, 53 N. H. 442."

Leaving out of sight, for the moment, the influence which modern legislation may have on the views of judges as to the common law,[52] we should predict that the present tendency of the courts will continue, and that the ultimate result will be reached in the near future; *viz.*, that, in cases of blasting, the exceptional doctrines of absolute liability will no longer be applied, and that decisions in favor of plaintiff will be based upon negligence.[53] Should this be so, just results will be reached in blasting cases. And, at the same time, the modern statements of the law will tend to legal symmetry; while "most of the serious difficulties and complexities which now exist" would be "eliminated." [54]

(To be concluded.)

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[51] 7 HARV. L. REV. 441, 455, note 3.

[52] As to which see the second instalment of this article which is to appear in the March issue.

[53] In 1 STREET, FOUNDATIONS OF LEGAL LIABILITY, 80, the author says that, under modern law, "a defendant in trespass can always excuse himself by showing that the injury complained of was purely accidental, and that it happened without any fault of his." Later, on page 84, he says: "That some degree of fault or blameworthy negligence is essential to liability for unintended harm wrought by things not dangerous *per se* goes without saying. In regard to damage done by things inherently dangerous, we cannot speak with such certainty; for the grounds of liability in this field have not been fully canvassed and the subject has not been generally understood. *Unquestionably the law must in the end reach the same basis as in the field of trespass.*" (The italics are ours.)

[54] See SALMOND ON TORTS, 4 ed., Preface, page v.

THE PROGRESS OF THE LAW, 1918-1919

WILLS AND ADMINISTRATION[1]

THE MAKING OF WILLS

I

THE Great War has not yet furnished us much litigation of American soldiers' wills. Doubtless instances will soon arise, and therefore two recent English decisions should be noted. In *Godman* v. *Godman*[2] it is stated that intention to make a will at the time of the creation of the matter offered for probate as a soldier's will is not necessary. It is enough if the testator deliberately intended to express his wishes for the disposition of his property after death. And so a letter of instructions for the alteration of a will would have been provable as a codicil, had it not been objectionable on other grounds. And likewise, a statement of the deceased to his fiancée, such as, "If I stop a bullet everything of mine will be yours," deliberately made in the presence of a witness, is good as a will, though there is some evidence that the deceased soldier thought he was incompetent to make a valid testament.[3]

We had never sympathized with the loose practice in the ecclesiastical courts under the Statute of Frauds which allowed written instructions to an attorney to operate, if necessary, as a will of personalty.[4] That practice clearly justifies, however, the action of Horridge, J., in the two recent cases. And we confess that, appearing in its present form, the practice does not seem so objectionable. The spirit of the provision governing this special class of wills certainly reaches to this situation. Expressions of soldiers in the trenches of their desires in regard to the disposition of their personalty after their death will, we predict, be given

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[1] The subject of Future Interests is not discussed herein.

[2] [1919] P. 229.

[3] *In re* Stable, [1919] P. 7.

[4] Fawcett *v.* Jones, 3 Phillim, 434, 485-487 (1810); Blackwood *v.* Damer, 3 Phillim. 458, note (1783); Masterman *v.* Maberly, 2 Hagg. 235, 247 (1829). See p. 620, *infra*.

effect to by our probate courts, though it cannot be proved that the deceased thought he was making a valid disposition of his worldly goods.

II

A joint will or a joint and mutual will may be executed in accordance with a contract between the testators to leave their property to the survivor, or to the survivor and after his death to others. Such a will is now held not against public policy. And some courts find the contract from the mere provisions of the will itself.[5] The better view is, however, that the contract should be clearly proved by other evidence than the mere execution of such an instrument.[6] In *Lewis* v. *Lewis*[7] a husband and wife by a joint and mutual will left their property to the survivor, and after the death of the survivor to their children. The wife died, the husband accepted benefits under the will, remarried, and died. The children of the first marriage brought a bill to quiet title to the husband's realty which the defendant, the second wife, claimed under the Statute of Distributions. The plaintiffs secured judgment, which was affirmed by the Supreme Court on the ground that there was a contract to leave the property as directed in the will, which after the receipt of the benefit was irrevocable by the second marriage or otherwise. Assuming, which is doubtful, the existence of a contract thus to dispose of the property, the result is correct, though the reasoning is not wholly satisfactory. If there is a will made in pursuance of a contract to devise, the will is indeed revocable, but the contract should be enforced in equity. And this view represents the weight of authority and the trend of the later cases.[8] Indeed the California court[9] has recently held that a second marriage revokes a will made in pursuance of a contract, but the agreement to devise is enforceable in equity. This is the neater handling of the matter, for the Probate Court in the old sense did not have

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[5] Frazier *v.* Patterson, 243 Ill. 80, 90 N. E. 216 (1909).

[6] Edson *v.* Parsons, 155 N. Y. 555, 50 N. E. 265 (1898). Compare Cooke *v.* Burlingham, 105 Misc. 675, 173 N. Y. Supp. 614 (1919).

[7] 104 Kan. 269, 178 Pac. 421 (1919).

[8] Professor G. P. Costigan, "Constructive Trusts," 28 HARV. L. REV. 237, 250–251; Morgan *v.* Sanborn, 225 N. Y. 454, 122 N. E. 696 (1919).

[9] Rundell *v.* McDonald, 182 Pac. (Cal. App.) 450 (1919). Compare, however, Chase *v.* Stevens, 34 Cal. App. 98, 166 Pac. 1035 (1917).

equitable powers.[10] In a modern probate court which by statute has full chancery powers, however, it may be expected that the short cut will be taken of probating a revoked will made in pursuance of a contract. It does not appear from the Kansas statutes that the Court of Probate has general equitable jurisdiction.[11]

III

The burden of establishing that a will is the act of a sane testator is upon the proponent in England and in many, but not all, of the United States.[12] The proponent, however, is often aided by the rule that if the will is rational on its face and appears to be duly executed, it will be held valid in the absence of evidence to the contrary.[13] The burden of proving undue influence, *i. e.*, coercion, however, is placed generally upon the contestant. This appears clear enough from the United States decisions;[14] but the English doctrine seems not wholly settled, though probably Baron Parke's remarks,

> "the *onus probandi* lies in every case upon the party propounding a Will; and he must satisfy the conscience of the Court that the instrument so propounded is the last Will of a free and capable testator,"[15]

would there be followed.

In *Spradlin* v. *Adams*[16] the court assumes that the burden of proving sanity is on the proponent, but declares that he has discharged the burden of going forward with evidence upon showing that the paper was not irrational in its provisions.[17] That the burden is upon the proponent is laid down specifically in *In re Dale's Estate*[18] and in *Johnson* v. *Shaver*.[19] *Adams* v. *Cooper*[20] puts the matter thus:

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[10] 27 YALE L. J. 546–547.

[11] GEN. STAT. (1915), chap. 27, art. 9.

[12] 1 JARMAN, WILLS, 6 Eng. ed., 48; 1 WOERNER, AM. LAW ADM., 2 ed., § 26.

[13] *Ibid.*

[14] 1 WOERNER, AM. LAW ADM., 2 ed., § 31.

[15] Barry *v.* Butlin, 2 Moo. P. C. 480, 482 (1838). And see 1 JARMAN, WILLS, 6 Eng. ed., 48. But compare Parfitt *v.* Lawless, L. R. 2 P. & D. 482 (1872), where it seemed to be assumed that the contestant had the burden of establishing coercion.

[16] 182 Ky. 716, 207 S. W. 471 (1919).

[17] On this latter point see Keller *v.* Lawson, 261 Pa. 489, 104 Atl. 678, 679 (1918); *In re* King's Will, 172 N. Y. Supp. 869, 872 (1918); *In re* Dow's Estate, 183 Pac. (Cal). 794 (1919).

[18] 179 Pac. (Ore.) 274 (1919).

[19] 172 N. W. (S. D.) 676 (1919).

[20] 148 Ga. 339, 343, 96 S. E. 858 (1918).

"The burden is . . . upon the propounder . . . to make out a prima facie case by showing the factum of the will, that is, to show that [the testatrix] executed the paper in the manner the law requires wills to be executed; that at the time of its execution the testatrix apparently had sufficient mental capacity to make it, and in executing the will she acted freely and voluntarily. . . . The burden is thereby shifted to the caveators to prove the validity of the objections they have made to the probate of the will."

In *Oilar* v. *Oilar* [21] the contestant failed to sustain the burden put upon him by the court to establish the invalidity of the will and the codicil for undue influence and insanity.[22] This general doctrine as to undue influence has been reaffirmed in *In re Dale's Estate, supra*, and in *Re Fenstermacher's Estate;* [23] but observe the statement to the contrary in the extract from *Adams* v. *Cooper, supra*. A series of Illinois cases has reiterated the doctrine already enunciated in Illinois that the mere fact that a beneficiary is in a confidential relation to the testator does not shift to him the burden of proof that he did not coerce the deceased,[24] and that presumption of coercion only arises when the beneficiary prepares the will.[25] A person not a blood relation to the testator, but whom he treated as a sister, is not in a confidential relation to him within the meaning of this rule.[26]

The burden of establishing sanity and freedom from undue influence should be upon the proponent. A will, unlike a contract, is a unilateral transaction, upon which other parties do not act until the court passes upon it. It may well be said that insanity and coercion are not affirmative defenses to be alleged and proved by the heir, but must be negatived by those who insist on the will. The slight recognition of this in undue influence by *Adams* v. *Cooper* is gratifying in view of the great weight of authority to the contrary. The current decisions in general fall into the common error of failing to distinguish clearly between the burden of going forward with evidence and the burden of establishing the issue.

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[21] 120 N. E. (Ind.) 705 (1918).

[22] See *accord* as to insanity, Gilmore *v.* Griffith, 174 N. W. (Iowa) 273 (1919).

[23] 102 Neb. 560, 168 N. W. 101 (1918).

[24] McCune *v.* Reynolds, 123 N. E. (Ill.) 317 (1919).

[25] Wunderlich *v.* Buerger, 287 Ill. 440, 122 N. E. 827 (1919); Snyder *v.* Steele, 287 Ill. 159, 122 N. E. 520 (1919).

[26] Gager *v.* Mathewson, 107 Atl. (Conn.) 1 (1919).

The Illinois cases on beneficiaries in a confidential relation to the testator represent a compromise between those decisions which follow the rule as to transactions *inter vivos* and those which reject it.[27] On principle the analogy of deeds should not be followed. Such advisers are the natural objects of the testator's bounty. Each case should be dealt with on its own facts; in each the question being: has, on all the evidence, the propounder of the will sustained the burden of establishing that the deceased acted freely? The relation to the testator is merely one of the facts of more or less importance depending upon the circumstances.[28]

IV

Mistakes in a will conceivably might be remedied by either (*a*) construction or (*b*) reformation. By the first method the court finds that though the testator has made a mistake, the rest of the will has enough in it to express poorly yet sufficiently the testator's meaning. In all jurisdictions this power, of course, lies in the courts. By the second method the mistake might be remedied by striking out in the Probate Court, and in the court exercising similar jurisdiction, words inserted by mistake, as has occasionably been done in recent English decisions, but rarely, if at all, in the United States; or by inserting words erroneously omitted, which has never been allowed in any common-law jurisdiction.

In *Stevenson* v. *Stevenson*,[29] the testator owned land in township 6 north, range 7, west of the fourth principal meridian, in Hancock County. He devised land in township seven (7) north of the base line, and range six (6) west of the fourth principal meridian, situated in the county of Hancock, which described an existing lot never owned by him. There was nothing in the will indicating that he intended to devise land he owned. The court, following *Kurtz* v. *Hibner*,[30] declined to allow the lots in township 6 north to pass under the will. Three judges dissented.

A similar result on similar facts was reached in *Rivard* v. *Rivard*,[31]

[27] See Parfitt *v.* Lawless, L. R. 2 P. & D. 482 (1872); Ginter *v.* Ginter, 79 Kan. 721, 743, 101 Pac. 634 (1909); St. Leger's Appeals, 34 Conn. 434 (1867); Morris *v.* Stokes, 21 Ga. 552, 575 (1857).

[28] See Barry *v.* Butlin, 2 Moo. P. C. 480 (1838).

[29] 285 Ill. 486, 121 N. E. 202 (1918).

[30] 55 Ill. 514 (1870).

[31] 285 Ill. 564, 121 N. E. 212 (1918).

decided on the same day; but the contrary was held last fall in Iowa in *Wilmes* v. *Tiernay*.[32] In *Perkins* v. *O'Donald*[33] the facts were the same, except that the will recited at the beginning that the testatrix was desirous of settling her worldly affairs and of "directing how the estate with which it has pleased God" to bless her should be disposed of after her death; and under item 5 (the device in question being numbered "Item 3") she settled the "rest and residue" of her estate in trust. The court refused to allow the lot actually owned by the testatrix to pass under the will.

The case of *Stevenson* v. *Stevenson* caused Mr. H. Clay Horner to propose last spring to a committee of the Illinois Legislature the following amendment to the Chancery Act, Section 50:

"50. 'The court may hear and determine bills to construe wills, notwithstanding no trust or questions of trust, or other questions are involved therein; *and in so construing wills, the court shall, in all cases, take into consideration the material facts and circumstances surrounding the testator at the time the will construed was executed, and at the time the testator died and if such facts and circumstance show that a mistake was made in writing the will, and also show the actual intent of the testator, the court may correct such mistake and give effect to the actual intent of the testator.*'"

He has also supported the bill in three editorials in the Illinois Law Bulletin.[34] Mr. Albert M. Kales has written notes opposing it.[35] The bill was later narrowed by its proposer to limit its terms strictly to descriptions of property in wills. Mr. Kales suggested as a substitute the following:

"that the court may find by implication in a will the words 'belonging to me' in connection with any description of real estate devised, provided it is satisfied from the context of the instrument, and evidence admissible under the existing rules of law, that the intent of the testator's inducement was to devise land belonging to himself."

Mr. Horner finds necessity for his legislation in the narrow doctrine of *Kurtz* v. *Hibner*, which has in effect been overruled in Illinois, and in a desire to extend to wills the jurisdiction in equity to reform transactions *inter vivos*, and adds that "the highest court

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[32] 174 N. W. (Iowa), 271 (1919).
[33] 82 So. (Fla.) 401 (1919).
[34] 2 ILLINOIS L. BULL. 175, 286, 293.
[35] *Ibid.*, 287; 14 ILLINOIS L. REV. 147.

in the land has added the jurisdiction to correct mistakes in wills without legislation." Here he refers to the decision of the Supreme Court of the United States in *Patch* v. *White*.[36]

Mr. Kales, on the other hand, finds that *Kurtz* v. *Hibner* has not been departed from in Illinois, that it is clearly distinguishable from *Patch* v. *White*, wherein the will clearly showed on its face, first, the desire of the testator to devise property belonging to him, and all of it; second, his belief expressed in the residuary clause that he had already disposed of his lot now in litigation; and third, the added description of the land as containing "improvements." [37] Mr. Kales dissents from the view that the Supreme Court reformed the will in *Patch* v. *White* for mistake, and considers Mr. Horner's proposed legislation a calamity to the law of the state, as giving unlimited jurisdiction to reform a will for mistake. Mr. Horner replies that in applying the rule of *falsa demonstratio* courts have many times corrected mistakes, and that the minority in *Patch* v. *White* said that the court reformed the will for mistake. The Kurtz case follows *Miller* v. *Travers*,[38] where the words "all my freehold estate" were in the will and disregarded, yet the Stevenson case clearly holds that had those words been in the will all devises would have been good. Mr. Horner therefore fails to find the harmony in the Illinois cases and in *Patch* v. *White*. He finally quotes Professor J. B. Thayer on *Kurtz* v. *Hibner*, that the true view

"appears to be that there is no question of ambiguity in the matter; there is a mistake; and the question is whether the will, taken as a whole, admits of a construction which will correct the mistake. All extrinsic facts which serve to show the state of the testator's property are to be looked at, and then the inquiry is whether, in view of all these facts, anything passes. The method of the court in that case is justly discredited. In reality Wigram's book, in 1831, gave it a death-blow." [39]

We can view Mr. Horner's proposed legislation in no other light than giving the court power to go so far as to fill in a complete blank in a will provided there is clear enough evidence of the testator's intent. Mistakes of course can to a limited extent be

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[36] 117 U. S. 210, 217 (1886).

[37] See Mr. Kales' article in 28 YALE L. J. 33, 46–48.

[38] 8 Bing. 244 (1832).

[39] THAYER, PRELIMINARY TREATISE ON EVIDENCE, 467, 468.

corrected by construction if something is found in the will upon which to hang the testator's intent.[40] But the proposed bill, in spite of the words "and in so construing wills," would seem to go far beyond this. And indeed Mr. Horner intended that it should, for he says of it:[41]

"the power to *correct mistakes* is all that is new, and this power is given only where, as in Stevenson's case, the court can see the mistake, but feels powerless under the 'construction-throttling' precedents, to correct it."

No court — much less our Supreme Court — has or will fill in a blank in a will by reformation. Our Supreme Court was speaking of correcting mistakes by construction where it said in *Patch* v. *White*,

"where it [the ambiguity] consists of a misdescription . . . if the misdescription can be struck out, and enough remain in the will to identify the person or thing, the court will deal with it in that way; or, if it is an obvious mistake, will read it as if corrected."

Patch v. *White* was rightly decided on the ground of construction of the whole will, and is distinguishable in its facts from the Stevenson case and *Kurtz* v. *Hibner*. Professor Thayer, while he preferred the attitude of the court in *Patch* v. *White* to that in *Kurtz* v. *Hibner*, and thought the two cases indistinguishable, clearly felt that the correction of the mistake by the United States Supreme Court was through the process of construction. He deals with the case under the heading of construction, paragraph 10 (i).[42] Under paragraph 13[43] he discusses *Miller* v. *Travers*,[44] and shows that no question of construction was involved therein, but an unsuccessful attempt to reform a will for mistake. That Professor Thayer would have been opposed to filling in a blank in a will is clear from his reference to an imperfection of expression which is in its nature inconceivable: "as a gift 'to one of the sons of J. S.,' or 'to Mr. ——.' In such cases, of course, no 'parol evidence' can help."[45]

We cannot but feel that the attitude of the chancellors and the

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[40] Compare *In re* Wolverton Mortgaged Estates, 7 Ch. D. 197 (1877).

[41] 2 Illinois L. Bull. 175, 179.

[42] Thayer, A Preliminary Treatise on Evidence, 449, 466.

[43] *Ibid.*, 474.

[44] 8 Bing. 224 (1832).

[45] Thayer, A Preliminary Treatise on Evidence, 435.

judges in refusing to reform a will for mistake is wise. Historically perhaps the reason for this refusal was, as Mr. Horner points out,[46] the absence of consideration,[47] but an equally important reason is the dangerous character of the jurisdiction to inquire into a man's intent after his death,[48] and the additional objection, in the case of inserting words omitted through error, that to that extent the requirement of witnesses in the Wills Act will be violated. Extrinsic evidence must be gone into in aid of construction, for there is no

"lawyer's Paradise where all words have a fixed, precisely ascertained meaning; where men may express their purposes, not only with accuracy, but with fulness; and where, if the writer has been careful, a lawyer, having a document referred to him, may sit in his chair, inspect the text, and answer all questions without raising his eyes." [49]

But to substitute the testator's intent for what he has said in the will or omitted therefrom is an entirely different matter.

We are therefore glad to hear that Mr. Horner's proposals have been rejected by the committee of the Illinois legislature.

Turning for a moment to the four recent cases, we find that *Stevenson* v. *Stevenson* and *Rivard* v. *Rivard* are not inconsistent with *Patch* v. *White*, for in neither of the two cases was there anything on the face of the will to show that the testator, as in *Patch* v. *White*, was trying to dispose of property which he owned. In the Iowa case of *Wilmes* v. *Tiernay* the provisions of the will are not given except the clause in dispute, which does not show that the lot referred to belonged to the testator. The report states that the rest of the will disposed of all his property except the lot in question, and that the lot described in the will was to be sold and the proceeds applied for masses. These two facts are hardly enough to justify a result similar to that in *Patch* v. *White*. In the Florida case, however, it is clear from the face of the will that the testatrix meant to dispose of property she then owned, that she owned no other property in North Pablo Beach than the lot in question, and the disputed devise referred by exact description to actual property in North Pablo Beach which did not in fact belong to her. It would

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[46] 2 Illinios L. Bull. 296.

[47] Mr. Roland Gray in 26 Harv. L. Rev. 212.

[48] Sugden, Law of Property, 197; Kales, 2 Illinois L. Bull. 291.

[49] Thayer, A Preliminary Treatise on Evidence, 428, 429.

seem, therefore, that the Florida case is in its result at variance with *Patch* v. *White*, though it must be admitted that the latter will more clearly described the lot in litigation than the former.

Wills — Miscellaneous Cases

I

Some miscellaneous cases on the making and revocation of wills may be considered. A young man in good health about to start on a long journey made the following will, duly witnessed:

> "In case of any serious accident, after my just debts are paid, I direct that my aunt Miss Mary E. Clark, take entire charge of my estate for disposal as she sees fit."

Apparently the deceased died several years later, not because of an accident. The court held the will not conditional and admitted it to probate.[50] Even if it be said that the words "in case" tend toward condition, that clause used by a young man in full health to whom death presented itself only in the form of an accident may, in a will disposing of all his property to a near relative, be construed to be interpreted as absolute.[51]

II

The provision of the New York statute that a will must be signed "at the end of the will"[52] still fosters litigation, even in cases which had all but been previously decided. In *Lowden's Estate*[53] the will was on a sheet of paper folded to form four pages. The first page contained a printed form of will. Some bequests were on page one in the space allotted to them. There was not, however, room enough for all, and in the middle of the fourth bequest the testatrix had written "continued on back," and other gifts covered page two and part of page three. The signatures of the testatrix and witnesses were in the spaces provided for them on the first page. The court rightly, in view of prior New York decisions,[54] declined to probate any part of the instrument. As an

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[50] *In re* Tinsley's Will, 174 N. W. (Iowa) 4 (1919).

[51] Eaton *v.* Brown, 193 U. S. 411 (1904).

[52] Consol. Laws 1909, Decedent Estate Law, § 21.

[53] 106 Misc. 707, 175 N. Y. Supp. 591 (1919).

[54] Matter of Conway, 124 N. Y. 455, 26 N. E. 1028 (1891).

original question — not now open in New York — a strong argument might be made for probating the parts of the will which preceded the testator's signature.

III

The federal court, administering the law of Missouri, has held that whether or not under the statute the witnesses of a blind woman's will have signed in her presence depends upon the same rule as that which would be applied to her if she had had sight. Apparently in the case of a normal testator the court thinks that for Missouri the rule is or ought to be the usual one,[55] a signing within view of the testator. The test for the blind man is, then, Could he have seen the act of the witnesses had he had his sight? And this test was found to be satisfied where the witnesses were ten feet away in an adjoining room connected by an open archway with the chamber in which the testatrix was.[56] Thus the court follows the English rule for decedents who cannot see.[57] The dissenting judge, however, has the better of the argument in requiring a narrower rule for the blind. There is no hardship in insisting that consciousness through other senses of the witnesses' act should be required of a testator who cannot see. Indeed the protection of the statute can be secured to him in no other way; for the test within view of a person of full capacity can give him no aid; and yet his hearing and touch are unusually developed. An exception to a rule, sensible in the normal situation, should be made in the case of a person thus disabled, even though a closer proximity of the witnesses is thereby required.[58]

IV

A testatrix just before her death wrote a letter to her attorney which she signed and had witnessed by two persons as follows: "Dr. O'Kennedy — Dear Friend: Please destroy the will I made in favor of Thomas Hart." Dr. O'Kennedy had the will in his possession but did not destroy it. A New York surrogate court

[55] Quirk *v.* Pierson, 287 Ill. 176, 122 N. E. 518 (1919).
[56] Welch *v.* Kirby, 255 Fed. 451 (1918).
[57] Goods of Piercy, 1 Rob. Eccl. 278 (1845).
[58] See Riggs *v.* Riggs, 135 Mass. 238 (1883).

admitted the will to probate.[59] The court seems right in saying that as the writing showed an intent to revoke by an act and not an intent to revoke by instrument, the letter cannot operate as a revocation. In England the same point — with less reason — has been decided in favor of the revocation,[60] though a slight difference in wording between the New York Act and the Wills Act of 1837 gives the American court an excuse for distinguishing the case.[61]

V

It is very unusual that a will with an express revocation clause fails to revoke a prior will, yet of course if from the whole of the second document it can be gathered that the testator meant both wills to be probated his intention will be carried out.[62] A recent and sound decision of this sort is *Owens* v. *Fahnestock*.[63] The first will contained nine numbered items. The ninth item contained the appointment of an executor. The second paper was headed "Item Ten," began with an exact copy of the formal preamble and the general revocatory clause of the first will, and then appointed W. L. Verner as attorney to take charge of the property after death "and hold same together until the arrival of my said executor. And that my said attorney immediately notify my said executor and also my other relatives." That was all. The court very properly probated both wills.

VI

Conditional revocations by subsequent instrument are possible but infrequent. The Pennsylvania court found no condition in a codicil reducing legacies in the will "in order to avoid a possible deficiency, which may grow out of the shrinking of investments." [64] This seems sound.[65]

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[59] *In re* McGill's Will, 107 Misc. 109, 177 N. Y. Supp. 86 (1919).

[60] Goods of Durance, L. R. 2 P. & D. 406 (1872).

[61] 107 Misc. 109, 177 N. Y. Supp. 86, 89, 90 (1919).

[62] Denny *v.* Barton, 2 Phillim. 575 (1818); Dempsey *v.* Lawson, 2 P. D. 98, 107 (1877); Simpson *v.* Foxon, [1907] P. 54.

[63] 96 S. E. (S. C.) 557 (1918).

[64] *In re* Prevost's Estate, 107 Atl. (Pa.) 388 (1919).

[65] Compare Att'y-Gen'l *v.* Lloyd, 1 Ves. Sr. 32 (1747); Penick's Ex'r *v.* Walker, 99 S. E. (Va.) 559 (1919).

VII

A bill in equity in New Jersey to set aside the probate of a will because of fraud in its procurement and in obtaining letters of administration and to enjoin defendant from using the surrogate's decree has been dismissed by the Vice Chancellor.[66] Here is an attempt to attack collaterally the decree of the Probate Court which has jurisdiction. No authority allows this.[67] Whether the court of equity will fasten a constructive trust on the fraudulent beneficiary in favor of those best entitled is, as the court points out, a different question.[68]

VIII

In *Sussex Trust Co.* v. *Polite*[69] the testator devised all land in Sussex County "where I now reside" to P. At the date of the will this tract contained about forty-five acres. He then conveyed twelve of these and at the same time acquired thirty-three acres of contiguous land. The court held that the latter tract had passed under the will. By the Delaware statute land acquired after the making of the will passes as if possessed at that time, unless a contrary intention is shown. This the court said with good reason was not as broad as the similar provision in the English Wills Act,[69A] and made no new rule of construction for specific devises but applied rather to general devises.[70]

Having found this devise to be a specific devise, the court then said that of course the ultimate question was as to the testamentary intention in the light of the facts existing at the death of the testator. How this conclusion is consistent with the rule of construction just enunciated it is hard to see. We believe that under the rule of the Delaware statute as to this devise the intention of the testator at

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[66] McCormack *v.* Burns, 89 N. J. Eq. 274, 105 Atl. 70 (1918).

[67] Noell *v.* Wells, 1 Lev. 235; Plume *v.* Beale, 1 P. Wms. 388 (1717); Allen *v.* M'Pherson, 1 H. L. Cas. 191 (1845); but see Barnesly *v.* Powel, 1 Ves. Sr. 119, 284 (1748).

[68] Marriot *v.* Marriot, 1 Strange, 666; Segrave *v.* Kirwan, Beatty (Ir.) 157 (1828); Broderick's Will, 21 Wall. (U. S.) 503 (1874); Mellor *v.* Kaighn, 89 N. J. L. 543, 99 Atl. 207 (1916) (*semble*). Compare Lewis *v.* Corbin, 195 Mass. 520, 81 N. E. 248 (1907); Dulin *v.* Bailey, 172 N. C. 608, 90 S. E. 689 (1916).

[69] 106 Atl. (Del.) 54 (1919).

[69A] 1 Vict. c. 26, § 24.

[70] Hines *v.* Mercer, 125 N. C. 71, 34 S. E. 106 (1899).

the date of the making of the will is important, and that subsequent acts of his are only admissible to clarify doubt as to his meaning at that time. His later purchase of thirty-three acres and use of them in connection with the balance of his Sussex property can hardly override his use of the words "where I now reside."[71] The decision, therefore, seems questionable.

IX

We are reminded by *In re Shirley's Estate*[72] that the modern tendency is to uphold a condition in a devise that the beneficiary, if he contests the will, shall lose his gift. That case reaffirms the California view, which enforces without reservation such a provision.[73] In Pennsylvania such a condition is enforced if the contest is without reasonable foundation, but otherwise not.[74] Pennsylvania reaches a highly desirable result, but it is difficult to see how a condition broadly framed, as is usual, to cover any sort of contest, can be divided by the court when the testator has not split it. We are left to choose, then, between supporting a provision preventing all litigation by the beneficiaries, or rejecting it entirely. The modern view seems to be that the chance for abuse of the process of the courts in will contests outweighs the disappointing of honest litigation. Even California does not go so far as to deprive a beneficiary under such a will of her legacy where she attempts, honestly but unsuccessfully, to probate a later document purporting to revoke the earlier instrument.[75]

Executors and Administrators

I

Statutes defining claims which survive against the representatives of a deceased person do not prevent litigation. *In re Brace's*

[71] 30 Harv. L. Rev. 298. Cranworth, V. C., in Stilwell *v.* Mellersh, 20 L. J. Ch. 356, 361 (1851). But see Garrison *v.* Garrison, 5 Dutch. (N. J.) 153 (1861), where, however, the statute differed slightly from that of Delaware.

[72] 181 Pac. (Cal.) 777 (1919).

[73] Estate of Hite, 155 Cal. 436, 101 Pac. 443 (1909).

[74] Friend's Estate, 209 Pa. 442, 58 Atl. 853 (1904).

[75] *In re* Bergland's Estate, 182 Pac. (Cal.) 277, 278 (1919). "Should any one or more of the beneficiaries named in this will object to the distribution as made, or attempt to defeat the provisions of this will that said person or persons shall receive the sum of five dollars ($5.00) each and no more."

Estate[76] holds that under the Code of Civil Procedure relating to debts against estates, a claim for unpaid alimony decreed to a wife for the maintenance and education of a son, who had predeceased his father, and which had accrued at the latter's death, was payable out of his estate. This broad interpretation of the word "debt" seems sound, and the result is in accordance with the cases elsewhere.[77] A claim in tort for deceit, however, has just been held in Washington not to survive against the administratrix of the tort-feasor.[78] The authorities are divided and continued litigation can only be prevented by very explicit language in the statute.[79]

The common-law rule that a personal action does not survive in favor of administrators is illustrated in decidedly modern form in a case under the Sherman Act. The heirs of one who had acquired a right in tort under that act against the defendants for damage caused by a conspiracy to monopolize the sugar refining business were not allowed to recover.[80] The Sherman law being silent as to revival and there being no other statute of the United States affecting the case, the court decided that the common law applied, and, on the analogy of actions of deceit, the cause abated, with the death of the plaintiff. By Statute 4 Edw. III, c. 7, executors and administrators may sue for injury done to the personal estate of the deceased. In England the statute has been held to apply to an action against the promoters of a company for damage caused by a fraudulent prospectus,[81] and to an action of slander of title to a trade-mark.[82] This statute should be part of the common law of the United States and might well be extended by interpretation to any instance where the defendant's wrongful act has deprived the plaintiff's intestate of property, as in the principal

[76] 105 Misc. 178, 173 N. Y. Supp. 636 (1918).

[77] See Knapp *v.* Knapp, 134 Mass. 353 (1883); Martin *v.* Thison, 153 Mich. 516, 116 N. W. 1013 (1908); Hassaurek *v.* Markbreit, 68 Ohio St. 554, 67 N. E. 1066 (1903); *In re* Stillwell, [1916] 1 Ch. 365.

[78] State *v.* Blake, 181 Pac. (Wash.) 685 (1919).

[79] Arnold *v.* Lanier, 1 Car. Law Repository (N. C.) 529 (1813); Cutter *v.* Hamlen, 147 Mass. 471, 18 N. E. 397 (1888); Tichenor *v.* Hayes, 41 N. J. L. 193 (1879); Brackett *v.* Griswold, 103 N. Y. 425, 9 N. E. 438 (1886); Henshaw *v.* Miller, 17 How. (U. S.) 212 (1854); Jones *v.* Ellis, 68 Vt. 544, 35 Atl. 488 (1896); Boyles *v.* Overby, 11 Gratt. (Va.) 202 (1854); Lane *v.* Frawley, 102 Wis. 373, 78 N. W. 593 (1899).

[80] Caillouet *v.* American Sugar Refining Co., 250 Fed. 639 (1917).

[81] Twycross *v.* Grant, 4 C. P. D. 40 (1878).

[82] Hatchard *v.* Mège, 18 Q. B. D. 771 (1887).

case. Under recent statutes there is a conflict of decision on the survival of the action for deceit in favor of the representatives of the plaintiff.[83] The nearest analogy to the situation under the Sherman Act that we have found is *Frohlich* v. *Deacon*.[84] There executors sued for conspiracy and unlawful combinations and restraint of trade. The Michigan act provided that an action of assumpsit might be brought by representatives in any case where injury to person or property would be ground for action on the case for fraud or deceit at common law. The eight judges were equally divided as to whether the action for such conspiracy fell within the statute.

In *Pruett* v. *Caddigan* [85] the testator at the time of his decease was surety on a bond for $2500 given by the guardian of a minor's estate. In April, 1916, his executor filed his final account. In March, 1916, the guardian filed his first account, which was rejected, and in June, 1916, a judgment of $3421.96 was recovered against him for breach of trust. Execution being wholly unsatisfied, the new guardian sued the executor of the deceased as surety, who demurred on the ground that the claim had never been presented to him under § 5964 and § 6057 of the Revised Laws of Nevada. These provisions require that all claims should be filed in three months, and that as to any claim not due, or any contingent or disputed claim, the amount, or such part thereof as holder would be entitled to if claim were due, shall be paid into court. The court held that the present claim was not a contingent demand, but was on a contingency whether there would ever be a demand. Here nothing could be paid into court but the penal sum of the bond, which at the time for the presentation of claims might not only never be the amount due, but might never become payable at all. Such claims need not be presented before maturity. This is in accordance with the practice in other states.[86] The writer has discussed within the year the authorities and principles involved.[87]

The common law of England as modified by Stat. 11 Geo. II, c. 19,

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[83] Cutting *v.* Tower, 14 Gray (Mass.) 183 (1859); Lane *v.* Frawley, 102 Wis. 373, 78 N. W. 593 (1899); Billson *v.* Linderberg, 66 Minn. 66, 68 N. W. 771 (1896); Brackett *v.* Griswold, 103 N. Y. 425, 9 N. E. 438 (1886).

[84] 181 Mich. 255, 148 N. W. 180 (1913).

[85] 176 Pac. (Nev.) 787 (1918).

[86] Massachusetts Rev. Laws (1902), c. 141, §§ 9, 13, 26–32, as amended by Acts (1914), c. 699; Forbes *v.* Harrington, 171 Mass. 386, 50 N. E. 461 (1898).

[87] 32 Harv. L. Rev. 329–332.

§ 15, giving an executor or administrator of a life tenant on whose death a lease granted by him had determined, the right to recover a ratable portion of the rent from the last day of payment to the death of the lessor, has been said to be part of the law of Oregon.[88] The technical rule that rent is not apportionable has been modified in many states by statute.[89] The Oregon case points a way to a just result where the legislature has not acted.

INHERITANCE TAXES

I

The decision in *In re Parker* [90] is entirely sound, and represents an important point of transfer tax law in a typical American family settlement. A New York testator left a large estate to trustees in trust for a niece, Mrs. P., for life, and after her death to divide the principal into as many shares as there were children of the niece then living and children then deceased leaving issue then surviving, the latter to take *per stirpes*. The residue was left to Mr. P., a nephew. By a possible though remote contingency, for the niece had several young children living at the testator's death, the nephew would receive the remainder to the class. In that event the tax would be higher than if the issue of Mr. and Mrs. P. took, for the residuary legatee was entitled at once under the will to an estate, exclusive of the remainder, of about $450,000, and the New York tax increases with the size of the legacy. The contingent remainder was held taxable as if it passed to the residuary legatee under the New York act,[91] which taxes forthwith a contingent interest at the highest rate that would be possible on the happening of any of the contingencies or conditions which the transfer may involve subject to a refund when the estate takes effect in possession. No other conclusion could have been reached by the court; yet the result is the tying up of property for the sake of a contingency little likely to occur. And it suggests to conveyancers the desirability in the future of drawing settlements as far as possible in the form of vested interests.

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[88] Perry *v.* Fletcher, 182 Pac. (Ore.) 143 (1919).
[89] 1 WOERNER, AM. LAW ADM., 2 ed., § 301.
[90] 226 N. Y. 260, 123 N. E. 366 (1919).
[91] LAWS OF 1919, c. 62, § 230.

II

Two recent Illinois cases have decided that in estimating "the clear market value of . . . property received by each person" upon which the state inheritance tax is to be estimated, the federal estate tax is to be considered an expense of administration and to be deducted.[92] Under the federal statute the tax is an estate tax, and not a charge against the particular beneficiary. This is sufficient to warrant the Illinois result and to account for the general unwillingness of the federal officers to deduct the state tax in estimating the amount due to the United States; for most state taxes are not based on the estate itself, but on the amount received by each distributee, and are a charge on him. Yet a federal judge has recently decided that if the state tax is, like the federal, on the estate and not paid by the beneficiary, it should be deducted in estimating the federal tax, under the provision allowing a deduction for "administration expenses . . ." and such other charges against the estate as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered.[93] If the same state under its decisions allows a deduction of the federal tax, puzzling questions will arise as to the method of estimating the amounts due to each jurisdiction. The subject should be cleared up by Congress and the state legislatures. The point is sufficiently important for their consideration, for it arises in connection with every estate of any magnitude.

III

The Illinois case of *People* v. *Northern Trust Co.*[94] contains a point by which conveyancers must not be misled. The testator during his life made trust deeds in favor of four of his children by which the trustee was to pay income to these children in equal shares, and after the death of each child his share was to pass as he

[92] People *v.* Pasfield, 284 Ill. 450, 120 N. E. 286 (1918); People *v.* Northern Trust Co., 124 N. E. (Ill.) 662 (1919); and see Appeal of Tyler, 104 Atl. (N. J.) 298 (1918); *In re* Knight's Estate, 261 Pa. 537, 104 Atl. 765 (1918); Hooper *v.* Shaw, 176 Mass. 190, 57 N. E. 361 (1900). In Estate of Gihon, 169 N. Y. 443, 62 N. E. 561 (1902), the court declined to deduct the United States tax, because under the law then in force the tribute was levied on the succession and not on the estate.

[93] Northern Trust Co. *v.* Lederer, 257 Fed. 812 (1919); 39 STAT. AT L. 777, § 203.

[94] 124 N. E. (Ill.) 662 (1919).

appointed with usual provisions in default of appointment, and other clauses common in American settlements. The agreements finally reserved to the settlor the power of revoking the deeds and trusts by notice in writing to the trustee. The court held that this reservation did not make the transfer taxable as "intended to take effect in possession or enjoyment at or after" death. One must not jump to the conclusion that such reservations are in all cases of no effect from the point of view of the transfer tax. In the principal case there was evidence that this provision was introduced not at the suggestion of the testator, but by the attorney by way of abundant caution to provide against the possible unworthiness of a beneficiary, and that the testator always declined to be consulted about the property. The court based its decision on the ground that the object of the power of revocation was not to evade the tax but merely to protect the grantees. No further effect, therefore, should be attributed to the decision.

IV

In *State* v. *Probate Court* [95] the testatrix left one third of a small estate to her husband and two thirds to her niece. To avoid a contest the will was probated by the consent of the legatees, the only parties interested, and a compromise agreement filed by which the husband and niece each took one half. Whether the husband took under the will or under the compromise was immaterial so far as taxing his interest was concerned. In either event his $10,000 exemption protected him. The court held, however, that the niece should pay taxes on one half only and not on the two thirds given her by the will. The decision has some support in Pennsylvania and Colorado.[96] But the contrary doctrine of Illinois, Massachusetts, and New York,[97] which taxes the estate according to the terms of the will and not according to the provision of the agreement, is preferable. It is true that a legatee may renounce, and if he does, the legacy is not taxable to him but to the residuary legatee; and if he may renounce in full, it is said he may by a com-

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[95] 172 N. W. (Minn.) 902 (1919).

[96] Pepper's Estate, 159 Pa. 508, 28 Atl. 353 (1894); People *v.* Rice, 40 Colo. 508, 91 Pac. 33 (1907); Matter of Cook, 187 N. Y. 253, 79 N. E. 991 (1907).

[97] Estate of Graves, 242 Ill. 212, 89 N. E. 978 (1909); Baxter *v.* Treas. and Rec'r Gen'l, 209 Mass. 459, 95 N. E. 854 (1911).

promise renounce in part, escape the burden, and let the person who actually receives the property pay the tax. But in renunciation, as in the case of lapsed [98] or void legacies, the law of wills or the intestate law — not the agreement of parties — carries the property to the person taxable. The doctrine of the Minnesota case lays the foundation for collusive agreements to deprive the government of its just due.

V

Both New York and Massachusetts have recently decided that the Federal Inheritance Tax is an estate tax, not a legacy or succession tax, and is not payable out of the interests of legatees, but from the residuary estate.[99]

Joseph Warren.

HARVARD LAW SCHOOL.

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[98] Compare *In re* Hedenberg's Estate, 89 N. J. Eq. 173, 104 Atl. 221 (1918).

[99] *In re* Hamlin, 124 N. E. (N. Y.) 4 (1919); Plunkett *v.* Old Colony Trust Co., 124 N. E. (Mass.) 265 (1919).

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PROTECTION OF PUBLIC SERVICE ENTERPRISES FROM COMPETITION. — One of the most significant features of the modern law of public utilities has been the adoption of a new policy regarding the protection of the public service enterprise from competition.

Twentieth-century conditions, under which the great mass of the people are dependent upon the public utilities for their very existence, have demonstrated the impracticability of the old policy of free competition in the public service field, and have proved that its characteristic duplication of investment, organization, and operating expense is an economic waste, not only productive of high rates and inadequate service to the public, but frequently resulting in total abandonment of that service.[1] Necessity has overthrown prejudice until it has come to be recognized that there is as direct a public interest in insuring a safe, adequate, and efficient service by providing for the stability of the public utility enterprise as there is in protecting the public utility patron from exploitation.[2] This modern conception has found expression in the widespread enactment of Public Utilities Acts inaugurating a new policy of comprehensive public regulation in the public utility field.

The former policy of free competition in action has been admirably illustrated by the recent case of *United Railroads of San Francisco* v.

[1] See Attorney-General *v.* Walworth Light & Power Co., 157 Mass. 86, 87, 31 N. E. 482 (1892); Weld *v.* Board of Gas & Electric Light Commissioners, 197 Mass. 556, 558, 84 N. E. 101 (1908).

[2] Idaho Power & Light Co. *v.* Blomquist, 26 Idaho, 222, 241, 141 Pac. 1083 (1914).

City and County of San Francisco.[3] A street railway had accepted its franchise and built its system forty years before under a general law providing that no two railroad corporations should occupy and use the same street or track for a greater distance than five blocks. The franchise contained a similar provision. The company was held not entitled to an injunction to prevent the city from constructing a competing railway in the same streets on either side of its tracks, on the ground that this limitation was not intended to affect the city when constructing a municipal street railroad under a later statute and an amendment to the state constitution.[4] The court further decided that in so far as the harm to the utility was the inevitable consequence of the city doing what the franchise did not make it unlawful for it to do, that did not constitute such a taking of property as to require eminent domain proceedings.[5] No better example of the policy of "cut-throat competition" in the public utility field, with its attendant waste, could be imagined than this duplication of the plant, equipment, organization, and operating expense of a great metropolitan transportation system; and this, in order to give the same form of service in a similar manner over the same routes to the same public, for the very purpose of destroying the established utility.[6]

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[3] 249 U. S. 517 (1919).

[4] *Cf.* White *v.* City of Meadville, 177 Pa. 643, 35 Atl. 695 (1896), where on facts similar to this case the court, recognizing the economic waste from such competition, held it would not impute to the legislature an intent to permit such destruction of property without compensation from the mere fact that at the same session statutes were enacted providing for creation of water companies to serve municipalities, and also authorizing certain class cities to construct and operate their own water system, and therefore enjoined the municipality from competing with the privately owned water company which was giving a satisfactory service under contract.

In the San Francisco case, however, the later statute specifically authorized not only the paralleling of the roadway of the existing utility by the municipality, but also the use of its tracks. Act April 24, 1911 (CAL. STAT. 1911, c. 580).

[5] Although the municipal charter here required the city to consider offers for the sale of existing public utilities before constructing new ones, the court ruled that this did not aid the case in view of a general solicitation of offers for sale to the city of any existing street railway therein passed by the Board of Supervisors, and sent to the complainant among others, but in regard to which it seems to have taken no action. The case therefore stands as if there had been no such charter provision.

[6] From the time of the classic Charles River Bridge case (Charles River Bridge *v.* Warren Bridge), 11 Pet. (U. S.) 420 (1837), we find the public utility enterprise seeking legal protection from the competition of a similar utility. There the competition was allowed on the principle that a corporate charter which simply authorized the erection of a bridge and taking of tolls thereon conferred no exclusive privilege, but in the almost equally famous Binghamton Bridge case, 3 Wall. (U. S.) 51 (1865), the desired protection was secured, the statute of 1805 incorporating the established bridge and forbidding the erection of any bridge within two miles above or below it being held to constitute an inviolable contract even as against the state. However, following the decision in the case of Dartmouth College *v.* Woodward 4 Wheat. (U. S.) 518, 625 (1819), holding a corporate charter to be a contract between the state and the corporation, protected by the contract clause of the Federal Constitution, the states were careful to reserve their legislative power, hence the doctrine of the Binghamton case proved of little practical value to the public utility proprietor.

Where the competing utility is operating without lawful authority, either as beyond its corporate powers or for lack of a state or municipal permit or license, the courts have been quick to grant injunctive relief to the lawfully established utility. Citizens' Electric Illuminating Co. *v.* Lackawanna & Wyoming Valley R. Co., 255 Pa. 176, 99 Atl. 465 (1916); Memphis St. Ry. Co. *v.* Rapid Transit Co., 133 Tenn. 99, 179

In striking contrast is the modern policy as applied in *Chicago Motor Bus Co.* v. *Chicago Stage Co.*[7] In that case the state public utility commission had granted a certificate of convenience and necessity for a motor-stage service in a certain district of Chicago to a newly organized company in preference to an established company. The latter had expended a large sum in developing its business, and had for some time satisfactorily served other sections of the city. The action of the commission was set aside on appeal as arbitrary and unreasonable, in the absence of any evidence that the new company would render a better service to the public. Briefly stated, the court held that, assuming both applicants equally capable of rendering an adequate service, the established company should be preferred in view of its past services, its expenditures, and its experience in the local field.

Here we have a case involving the entrance of a public utility into an unoccupied field. To be sure, in Illinois, as in most jurisdictions, the modern statute[8] goes much further than protection of the established utility; it requires a certificate of public convenience and necessity from the state public utilities commission as a prerequisite to the right to serve a given territory whether already occupied or not. But the underlying policy is the same, for, as this common treatment suggests, from the viewpoint of the paramount public interest the two situations are fundamentally alike. With the recognition that the public interest is in general best advanced by protecting the existing utility from competition, it became equally plain that the public utility enterprise should not be permitted to enter an unoccupied field until there is a sufficiently developed public need to assure its probable support, and then only if it is so equipped with capital, skill, and credit as to be potentially capable of maintaining an adequate service at reasonable rates. If there is to be protection from competition, it is desirable that there arise no necessity of competition to meet the normally expanding requirements of the public.[9]

How may we account, then, for the decision in the San Francisco case? The explanation lies in the fact that in California by constitutional provision[10] not only are municipal utilities exempted from the jurisdiction of the state commission, but except as to rates, the privately owned utilities operating in municipalities may be, and usually are, also exempted.[11] The public utilities acts in a number of states likewise specifi-

S. W. 635 (1915); Bartlesville Elec. L. & P. Co. *v.* Bartlesville Interurban Ry. Co., 26 Okla. 457, 109 Pac. 228 (1910); Indianapolis Cable St. R. Co. *v.* Citizens St. R. Co., 127 Ind. 369, 24 N. E. 1054 (1890). *Semble*, Millville Gas Light Co. *v.* Vineland Light & Power Co., 72 N. J. Eq. 305, 65 Atl. 504 (1906). For case where state commission was held entitled to an injunction to prevent illegal supply of electricity to the public as beyond corporate power of the offending company and done without a certificate of public convenience and necessity, see Pub. Serv. Com'n of N. Y. (2d Dist.) *v.* J. & J. Rogers Co., 184 App. Div. 705, 172 N. Y. Supp. 498 (1918).

[7] 287 Ill. 320, 122 N. E. 477 (1919).

[8] Illinois Public Utilities Act, June 30, 1913, § 55 (HURD'S REV. STAT. 1915-1916, c. 111a).

[9] Chicago Motor Bus Co. *v.* Chicago Stage Co., 287 Ill., 320; 122 N. E. 477 (1919).

[10] Amendment of November 10, 1911, Art. 11, § 19, California Constitution, STAT. 1911, Part II, p. 2180.

[11] Amendment of November 3, 1914, Art. 12, § 23, California Constitution, STAT. 1915, p. lvi.

cally exempt from their provisions utilities owned and operated by municipalities.[12] This limitation upon the scope of the modern policy seems unfortunate in view of the need for uniformity of regulation of methods, service, and rates throughout the entire public utility field, and many states quite properly make no such distinction.[13]

There are two views of the legal nature of this modern policy. That most generally accepted treats it as substituting a régime of regulated monopoly for unrestricted competition;[14] the other considers it to be merely a modification of policy from free competition to regulated competition.[15] Indeed, these views seem to predicate an issue between regulated competition and regulated monopoly.

But why the issue? Take the normal situation of a single utility enterprise lawfully furnishing a particular public service to a given community. There, as Professor Wyman has well pointed out,[16] the facts present a condition of virtual, *i. e.* actual, monopoly; hence, so far as that utility is subjected to the jurisdiction of the state utilities commission, clearly it is regulated monopoly. Now assume the usual statutory requirement of a certificate of public convenience and necessity, and a second utility

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[12] Illinois Public Utilities Act, June 30, 1913, § 10 (LAWS OF ILL. 1913, p. 465); Pennsylvania Public Service Company Law, July 26, 1913, Art. I (PA. LAWS 1913, p. 1374); Michigan Public Utilities Commission Act, May 15, 1919, § 4 (PUBLIC ACTS 1919, p. 753).

The constitutionality of this exemption has come before the Supreme Courts of Illinois and Pennsylvania, the contention being that it violates the constitutional prohibition against grants of special privilege.

In the Springfield Gas & Electric Co. *v.* The City of Springfield, decided April 15, 1919 (15 Rate Research, 115), the Illinois Supreme Court held the exemption unconstitutional; but a rehearing has been granted and therefore the case has not been reported.

The Pennsylvania Supreme Court upheld the constitutionality of the exemption in Consolidated Ice Co. *v.* City of Pittsburgh, decided January 5, 1920.

[13] REPORT OF NATIONAL CIVIC FEDERATION COMMISSION ON PUBLIC OWNERSHIP AND OPERATION, Part I, Vol. I, p. 26 — Municipal and Private Ownership of Public Utilities.

The Indiana Public Utilities Act of 1913, § 97 (BURNS' ANN. STAT. 1914, § 10052, u. 3), includes both municipal and privately owned utilities and expressly provides against such duplication as that in the San Francisco case by giving the municipality the right to take over the existing utility enterprise by eminent domain proceedings.

The administrative experience of the state public utilities commissions has shown that, tested by actual conditions, the public interest demands that the public service enterprise, whether privately owned or the subject of municipal ownership, should be brought within the provisions of the public utilities acts and the jurisdiction of the commissions, since they present the same fundamental problems. *Re* Village of Schenevus (N. Y. Pub. Serv. Com'n, 2d Dist.), P. U. R. 1919 E, 735 (certificate denied to municipality to establish plant to compete with existing public utility); Mackay Light & Power Co. (Idaho Pub. Util. Com'n), 15 Rate Research, 227 (1919) (certificate granted to privately owned utility to compete with municipal plant); *Re* Borough of Kittanning (Pa. Pub. Serv. Com'n), P. U. R. 1919 F, 182 (certificate denied to municipality until established utility had notice and opportunity to comply with its duty). The Pa. Pub. Serv. Co. Law 1913, Art. III, § 2 (PA. LAWS 1913, p. 1388), expressly includes proposed municipal corporation utilities within the provisions of the certificate of public convenience and necessity clauses.

[14] 1 WYMAN, PUBLIC SERVICE CORPORATIONS, 1911, preface, p. ix., and §§ 33, 156; Idaho Power & Light Co. *v.* Blomquist, 26 Idaho, 222, 141 Pac. 1083 (1914).

[15] Farmers' & Merchants' Co-operative Tel. Co. *v.* Boswell Tel. Co., 119 N. E. (Ind.) 513 (1918).

[16] 1 WYMAN, PUBLIC SERVICE CORPORATIONS, 1911, § 36, and chap. IV.

seeking to enter that field to provide a similar service. Is it not equally apparent that in placing the determination of whether this competition shall be allowed or not in the power of the state commission the result is a situation of regulated competition? Thus the truth of each view must be admitted when looked at in conjunction with the facts to which it properly applies; and since in the actualities of life these two situations work in harmony with each other, there seems to be no reason in the nature of things why the respective theories resting upon them should not be reconciled and the modern policy made to fulfill its broad purpose. It is submitted that neither the one interpretation nor the other can be adopted as the exclusive criterion. Nothing short of both functioning in coöperation will suffice to protect the public interest. In other words, the modern policy looking to comprehensive regulation is a synthetic policy, possessing the dual aspect of regulated monopoly and regulated competition.[17]

It is strange that the adherents of the theory of regulated monopoly seem to consider the certificate of convenience and necessity clause, characteristic of the modern policy, as proof of their contention. They base their argument on the evident assumption that monopoly is thereby legalized and a right of monopoly introduced into the law of public utilities.[18] The words of those clauses indicate the fallacy of such a construction, for they expressly place the public interest above every other consideration and reserve to the commission the power to permit competition if it may reasonably be deemed necessary under the circumstances.[19] It follows that neither the grant of such a certificate to a particular utility, nor its refusal to a second utility seeking to enter an occupied field, creates a legal monopoly in favor of the fortunate utility. Thereafter, as before, the monopoly remains one of fact and not as of legal right.[20]

Again, to regard the grant or refusal of such a certificate as conferring an exclusive legal privilege would react to defeat the chief aim of the

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[17] Thus far the courts have adhered to the broad spirit of the modern policy irrespective of which of these views they considered it to represent, but the danger lies in repetition being taken for precedent to the destruction of its true purpose. A warning against this very thing was sounded in the case of State *ex rel.* Electric Co. of Missouri *v.* Atkinson, 275 Mo. 325, 204 S. W. 897 (1918).

[18] Report of National Civic Federation Commission on Public Ownership and Operation, Part I, Vol. I, p. 26. — Municipal and Private Ownership of Public Utilities: "Public utilities, whether in public or private hands, are best conducted under a system of *legalized* and regulated monopoly."

[19] This is particularly well brought out in the Tennessee Railroad and Public Utilities Commission Act, Feb. 21, 1919, § 7 (Public Acts 1919, p. 149), which provides: "That no privilege or franchise hereafter granted to any public utility . . . shall be valid until approved by said commission, such approval to be given when, after hearing, said commission determines that such privilege or franchise is necessary and proper for the public convenience and properly conserves the public interest. . . ." For the correct construction of such a clause see State *ex rel.* Electric Co. of Missouri *v.* Atkinson, 275 Mo. 325, 204 S. W. 879 (1918).

[20] Farmers' & Merchants' Co-operative Tel. Co. *v.* Boswell Tel. Co., 119 N. E. (Ind.) 513 (1918). In an analogous case, Gill *v.* Dallas (Texas Civ. App.), 209 S. W. 209 (1919), a city ordinance forbidding operation of jitneys within a certain district was held not unconstitutional as creating a (legal) monopoly in favor of a street railway company operating under municipal license therein, since such license was revocable at will.

modern policy, — promotion of the public interest, — for it would hamper progress in the public service field and render impossible that approximation to the advancement of science and invention which has been the feature of the wonderful development of the public utility. The draftsmen of the modern statute wisely foresaw that only a flexible policy would meet the needs of the situation, and that the way must be left open for the public to benefit promptly by discoveries of new forms of public service.[21] This was accomplished by a general restriction of protection from competition to service of a similar kind.[22] However, the newly introduced form of service was also subjected in most jurisdictions to the requirement of a certificate of convenience and necessity in order to make sure that the public would be benefited by its installation under the circumstances then and there prevailing.[23]

Virtual monopoly must not be confused with complete monopoly; rather is it a relative matter representing a normal condition of substantial monopoly under the circumstances.[24] To treat the modern policy as one of legal monopoly is inconceivable, for not only must the policy adapt itself to admit competition between different types of public service, but there are many other forms of competition from which as a practical matter it is impossible to protect the public utility enterprise. This fact has been emphasized by the recent era of rate increases throughout the public service field. The consumer's potential power of competition, which had been quite lost sight of, suddenly sprang into vital prominence. This the street railways found in their attempts to derive an increased revenue from increased rates in the face of the former passenger's foot and private automobile competition.[25] Again, the compe-

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[21] The competition between different types of public service supplying the same general need figured prominently in Public Service Commission of Washington *v.* Puget Sound Gas Co. (Wash. Public Serv. Com'n), P. U. R. 1918 F, 728. The commission said (p. 729): "In the main we can attribute this loss [in consumption of gas] to but one thing, and that is the great development in hydroelectrical energy and the cheapness of its productivity. Probably in no other line of activity has inventive genius played a greater rôle in the last decade than in the electrical field. There was a time when it appeared as if the Welsbach burner would bring gas for lighting purposes into general use. Following this invention, however, appeared the Tungsten electric lamp, which, owing to its low consumption of electric energy . . . relegated gas as a lighting factor, and has left it only in the field as a heat; and in this field it has, as never before, hydroelectric energy as a competitor. . . . This commission is not much concerned with competition between two distinct sources of energy; their efficiency is beyond our control; thus we should not be too much concerned when a newly developed form of producing energy displaces some older form. . . ."

[22] The Indiana Public Utilities Act of 1913, § 97 (BURNS' ANN. STAT. 1914, § 10052, t. 3), only requires a declaration of public convenience and necessity where a utility enterprise seeks to serve a municipality in which another public utility is lawfully engaged in a similar service.

[23] The Pennsylvania Public Service Company Law, July 26, 1913, Art. III, § 2 (PA. LAWS 1913, p. 1388), requires a proposed public utility enterprise to obtain approval of the public service commission to its incorporation, and in addition that it obtain the certificate of public necessity and convenience before it exercises any rights under any franchise, municipal grant, etc. Fagan *v.* Pittsburgh Transportation Co. (Pa. Pub. Serv. Com'n), P. U. R. 1919 E, 990.

[24] 32 HARV. L. REV. 170.

[25] *Re* Northampton, Easton & Washington Traction Co. (N. J. Board Pub. Util. Com'rs), P. U. R. 1919 A, 867 — foot competition; *Re* Massachusetts N. E. St. Ry. Co. (N. H. Pub. Serv. Com'n), P. U. R. 1919 F., 603 — private automobile competi-

tition of the people by a shifting of patronage[26] from one form of a public service to another, for example from the street railway to the steam railroad,[27] or from both to the jitney,[28] has proved a very effective weapon of defense against higher rates in spite of the modern policy. And always lurking in the background is the competition from various forms of private business, the wood lot, the coal yard, and the kerosene cart, ever ready competitors of the luckless gas plant.[29]

It must be recognized that protection of the public utility enterprise from competition can, of necessity, be but an incident in the new policy of comprehensive regulation for the conservation of the public interest which so admirably adapts itself to the actualities of the business facts.

TAXES MEASURED BY WEALTH. — The theory that foreign chattels have a *situs* at the domicile of the owner so as to be taxable there is now fallen into disrepute;[1] where such a tax is imposed it is properly viewed as a personal tax, the amount of which is determined by the wealth of the subject.[2] The practice of measuring taxation by wealth, however, may be subject to constitutional limitation. In the case of a tax on property the fundamental law of the states usually requires that the amount taken be fixed by the value of the thing taxed.[3] On the other hand, if the tax is *in effect* either a privilege tax or a tax on the person,[4] the method of fixing the rate is not thus limited by constitutional prescription. "Due process of law" and the "equal protection of the laws" do not demand absolute equality of taxation,[5] and privilege and personal taxes will not run foul of these guarantees unless unnecessarily unfair,[6]

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tion; also: Milk and Cream Rates to Philadelphia, Pa., 45 I. C. C. Rep. 379 (1917) — automobile truck and wagon competition with steam railroad.

[26] Bedford-Fulton Telephone Co. *v.* Chapmans Run Mutual Co. (Pa. Pub. Serv. Com'n), P. U. R. 1919 A, 911 — holding commission had no authority to prevent a patron changing to a competing public service company.

[27] *Re* Interurban Railroads (Ind. Pub. Serv. Com'n), P. U. R. 1919 F., 192 — competition between interurban and steam railroads; *Re* Massachusetts N. E. St. Ry. Co. (*supra*, note 25) — steam railroad competition with street railway.

[28] *Re* Union St. Ry. Co. (Mass. Pub. Serv. Com'n), P. U. R. 1919 C, 900 — competition between jitneys and street railway; *Re* Pearl (Nevada Pub. Serv. Com'n), P. U. R. 1919 F, 299 — auto-truck competition with steam railroad; *Re* King (Cal. Railroad Com'n), P. U. R. 1919 F, 377 — competition of auto stage with steam railroad; *Re* Increased Freight Rates (Ind. Pub. Serv. Com'n), P. U. R. 1918 F, 304 — competition of auto-transportation with interurban electric railways.

[29] This was pointed out in Pub. Serv. Com'n of Washington *v.* Puget Sound Gas Co. (Washington Pub. Serv. Com'n), P. U. R. 1918 F, 728, where the commission said: "We have here a contest between the coal mine, the forest, and the hydroelectric plant, on one hand, and gas upon the other."

[1] Hoyt *v.* Commissioners of Taxes, 23 N. Y. 224 (1861).

[2] See Joseph H. Beale, "Jurisdiction to Tax," 32 HARV. L. REV. 587, 590.

[3] See JUDSON ON TAXATION, § 438, and appendix, pp. 760 *et seq.*

[4] Although the legislature may have had in mind the kind of tax which was beyond its constitutional power, if the courts can uphold the tax on some other theory as to its nature, they will do so. See Nicol *v.* Ames, 173 U. S. 509, 515 (1899). See JUDSON ON TAXATION, § 519.

[5] See BEALE ON FOREIGN CORPORATIONS, §§ 508, 509, 465; JUDSON ON TAXATION, § 450; GRAY, LIMITATIONS OF TAXING POWER, § 1122.

[6] Hatch *v.* Reardon, 204 U. S. 152 (1907); People *ex rel.* Farrington *v.* Mensching,

plainly discriminatory, or unequal in their application to subjects placed, for the purposes of taxation, in the same class.[7]

Only the law of the domicile may impose a tax on the person.[8] As has been suggested, a tax imposed by the state of the domicile on foreign chattels is to-day regarded in this light. If the state can tax its citizens and compute the tax on the basis of their foreign movable estate as well as property at home, there is no logical reason why foreign land could not also be made the basis of computation.[9] But the maxim *Mobilia sequuntur personam*, indicating that movables may be distributed according to the law of the domicile, was given a larger meaning by the courts.[10] They went so far as to give movables a fictitious *situs* for taxation at the domicile, and by way of compensation treated foreign land as peculiarly immune. The consequence is an apparent absence of cases in which a direct tax on foreign immovables has been sustained as a personal tax at the domicile based on wealth.[11] In *Union Transit Co.* v. *Kentucky*[12] the Supreme Court, in disregard of settled practice, decided that it was a denial of due process for the state of domicile to tax tangible movable property permanently situated and taxable abroad. Hence as to both foreign land and chattels the question is the same — can a state accomplish indirectly by means of a personal tax what it cannot do directly? The fact that the Supreme Court in the Transit Company case ignored the personal feature of the tax is some evidence that such a proceeding will be discountenanced, but the question must be considered as still open.

Inheritance taxes, one form of privilege or license taxation, may be imposed by the state of the decedent's domicile on the succession to chattels in another state, the rule of *Union Transit Co.* v. *Kentucky* having been expressly declared inapplicable to inheritance taxation.[13] Here again the *mobilia sequuntur personam* idea was the theoretical panacea. A better justification is that although foreign movables pass according to the law of the actual *situs*, the rule of distribution is furnished by the state of the domicile which, having furnished something, is entitled to tax its enjoyment.[14] But since the state where the goods

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187 N. Y. 8, 79 N. E. 884 (1907). See 19 HARV. L. REV. 460; 20 HARV. L. REV. 408. In Minot *v.* Winthrop, 162 Mass. 113, 38 N. E. 512 (1894), it was held that an inheritance tax exempting estates under $10,000 was valid under a constitutional provision requiring taxes to be reasonable. See 8 HARV. L. REV. 226.

[7] Magoun *v.* Illinois Trust & Savings Bank, 170 U. S. 283 (1898); Booth's Ex'r *v.* Commonwealth, 130 Ky. 111, 113 S. W. 61 (1908); *In re* Fox's Estate, 154 Mich. 5, 117 N. W. 558 (1908). See 12 HARV. L. REV. 127.

[8] The State *v.* Ross, 23 N. J. L. 517 (1852).

[9] "Logically there is no reason why, in taxing its residents, the state may not measure such tax by reference to their realty outside the state, as well as by any other method. The reason it cannot be done in fact is that such taxation would be so contrary to the settled habits of our governments and peoples as to be a denial of due process of law." GRAY, LIMITATIONS OF TAXING POWER, § 168 a.

[10] Hoyt *v.* Commissioners of Taxes, *supra*, p. 228.

[11] Since domestic corporations owe their existence and capacity to own property, wherever situated, to the state of creation, a tax on the capital stock representing in part foreign land is sometimes upheld. Kansas City Ry. *v.* Kansas, 240 U. S. 227, 232 (1916). *Contra*, Commonwealth *v.* American Dredging Co., 122 Pa. 386, 15 Atl. 443 (1888).

[12] 199 U. S. 194 (1905).

[13] 199 U. S. 194, 211 (1905).

[14] See Joseph H. Beale, "Jurisdiction to Tax," 32 HARV. L. REV. 587, 590, 628 *et seq.*

are can distribute them in accordance with the law of the domicile or otherwise at its pleasure, this explanation is also unconvincing. The alternative remains to conclude either that the practice is theoretically unsound or that only the transfer of property within the jurisdiction is taxed, but that the amount taken is based on the wealth of the decedent exclusive of foreign realty.[15] Under this last theory such deduction must be explained as a historical survival. Since the visible result is the same under any theory supporting the levy on foreign transfers, the law being settled that the state of the domicile can so tax, we must turn to the case of non-residents as affording the most illuminating test of taxes in proportion to wealth.

Here if foreign wealth, either movable or immovable, is to be taxed, it must be done indirectly in the form of privilege taxation. Suppose, for example, for permitting the succession to property owned by a non-resident within the state the state deducted a fixed percentage of the entire wealth of the decedent.[16] Another device, slightly less outrageous, would be to increase the rate of taxation in proportion to the entire estate of the non-resident.[17] Or the state might appropriate a certain percentage of the entire property received by the beneficiary. A more moderate method would make the rate of taxation depend on the entire amount received. This was in substance the theory of the New Jersey Inheritance Law,[18] the constitutionality of which was lately confirmed by the Supreme Court in *Maxwell* v. *Bugbee*.[19] The dissenting opinion written by Mr.

In re Cumming's Estate, 142 App. Div. 377, 127 N. Y. Supp. 109 (1911), upheld a tax on the succession to California property on the ground that the decedent died domiciled in New York although the California court had found him domiciled in California and had distributed the property in accordance with California law. The result of this case, if supported at all, must be explained on some other theory than the one suggested. See 24 HARV. L. REV. 573.

[15] It has been held that the federal government has even greater power to tax its citizens in respect to property held abroad and privileges exercised there than have the states. A federal license tax on vessels permanently in foreign waters has been held due process of law under the Fifth Amendment. United States *v.* Bennett, 232 U. S. 299 (1914). In the light of the great benefits conferred on its citizens by the national government one might expect greater latitude would be allowed it in assessing personal taxes on the basis of wealth. Perhaps the Bennett case may be supported on this ground. See 27 HARV. L. REV. 675.

[16] In People *v.* Equitable Trust Co., 96 N. Y. 387 (1884), a privilege tax of $.0015 on the dollar on the cash value of the capital stock of a foreign corporation was sustained. On the other hand in St. Louis S. W. Ry. *v.* Arkansas, 235 U. S. 350, 364 (1914), a tax of $.0005 was imposed on foreign corporations "upon the proportion of the outstanding capital stock of the corporation represented by property owned and used in business transacted in this state." In holding the tax due process of law the Supreme Court (opinion of Mr. Justice Pitney) relied on the fact that the tax was "measured by reference to property situate wholly within confines of the state."

[17] For example, the inheritance tax act might provide that where the decedent's wealth was under $10,000 the beneficiary should pay 10 *per centum* of the amount of the bequest; where the decedent's wealth was between $10,000 and $20,000, 20 *per centum*, etc. It was argued with some merit in Magoun *v.* Illinois Trust & Savings Bank, *supra*, that the act in question determined the rate in this fashion, but the court decided (page 298) that it was ". . . the estates which descend or are received which . . . are to pay a tax in proportion to their value." Had the act been given the construction contended for, it is questionable whether it would have been upheld.

[18] See PAMPH. L. 1909, p. 325, as amended PAMPH. L. 1914, p. 267.

[19] U. S. Sup. Ct. Nos. 43 and 238, October Term, 1919. See RECENT CASES, p. 616, *infra*.

Justice Holmes and concurred in by the Chief Justice and Justices Van Devanter and McReynolds suggests that in a flagrant case of assessment on the basis of wealth a majority would be opposed. Mr. Justice Holmes thought that "when property outside the state is taken into account for the purpose of increasing the tax upon property within it, the property outside is taxed in effect, no matter what form of words may be used." Of course if the doctrine of *Union Transit Co.* v. *Kentucky* should be carried so far as to immunize all tangible property abroad from both property and transfer taxation, then it might well be held that such property is exempt for all purposes. Moreover, it may be hoped that the law will take such a direction. But in the light of actual decisions is it sound to conclude that *any* valuation of foreign property to determine the rate of taxation is an attempt to accomplish indirectly with "ulterior purpose" what is beyond the "constitutional power"? An affirmative answer would deprive the practice of taxing foreign wealth, or its transfer, at the domicile, of its only sound theoretical foundation. For why is not a tax at the domicile when based in part on foreign wealth as much a tax on such wealth by indirection as is a privilege tax similarly assessed against a non-resident? That theory is best which without resorting to fictions may be reconciled with the most decisions which are still law. The majority view that "property not in itself taxable by the State may be used as a measure of the tax imposed" seems the more workable. The purpose and effect of the New Jersey statute was to prevent beneficiaries of non-resident decedents from escaping the increased rates on larger bequests.[20] Consequently the decision does not seem objectionable.[21] Only when taxation measured by wealth is carried beyond the line of fairness should it be upset, and then not as being in substance a levy on something beyond the jurisdiction, but as being so unreasonable and out of proportion to the benefits conferred as to be a denial of due process and the equal protection of the laws.[22]

PROHIBITION AND THE WAR POWER. — Since the time of Chief Justice Marshall's illuminating comments as to the branches of the government in whose province political questions lie,[1] there would seem to have been reason for the assumption that in such an exclusively political question as whether or not the country is still at war the Supreme Court would be reluctant to interfere with the legislative and executive decision. The

The leading New Jersey case under the law as amended is Maxwell *v.* Edwards, 89 N. J. L. 446, 99 Atl. 207 (1916).

[20] For an illustration of the method of the New Jersey law see Maxwell *v.* Edwards, 90 N. J. L. 707, 101 Atl. 283 (1917).

[21] The law was also attacked as a denial of privileges and immunities under Article IV, Sec. 2, of the Federal Constitution. On this question see Ward *v.* Maryland, 12 Wall. (U. S.) 418 (1870); State *v.* Lancaster, 63 N. H. 267 (1884); Wiley *v.* Parmer, 14 Ala. 627 (1848); Board of Education *v.* Illinois, 203 U. S. 553 (1906); Travellers' Ins. Co. *v.* Connecticut, 185 U. S. 364 (1902); Estate of Mahoney, 133 Cal. 180, 65 Pac. 309 (1901); Estate of Johnson, 139 Cal. 532, 73 Pac. 424 (1903); Maxwell *v.* Edwards, 89 N. J. L. 446, 99 Atl. 207 (1916).

[22] People *ex rel.* Farrington *v.* Mensching, *supra.* See, on the general subject of this note, Thomas Reed Powell, "Extra-territorial Inheritance Taxation," 20 COL. L. REV. 1.

[1] Luther *v.* Border, 7 How. (U. S.) 1 (1849).

dissent of four justices in a case upholding the constitutionality of the Volstead Act[2] comes as a somewhat staggering blow to what was thought a basic conception of our governmental system.

The upholding of the War-Time Prohibition Act[3] seemed only a well-advertised illustration of the division-of-powers principle. It seemed quite clear that Congress did not overstep the boundaries of its discretion when it decided that the declaration of an armistice did not mean that the war emergency was over, and that preventing the grain of the country from being made into liquor was one way of meeting that emergency. But the court conceded, for the purposes of the case, that the continued validity of the act might depend upon whether or not it appeared to the court that its necessity still existed. The meaning of that concession became evident when three of the four dissenting justices in *Ruppert* v. *Caffey*[4] based their dissent on the ground that, in their opinion, when the act was passed the necessity had ended.

Other questions raised in that case present no difficulty. A state statute providing for prohibition without compensation has been upheld on the ground that the restriction of use is not a taking of property;[5] the restriction in the Volstead Act, moreover, was not permanent, for at the time of the passage of the act there was nothing to show that the war would not end and demobilization be completed before the Eighteenth Amendment took effect. Mr. Justice Brandeis shows that eighteen states have enacted that a malt beverage containing one half of one per cent alcohol is intoxicating as a matter of law; state legislation prohibiting the sale of a beverage which may be innocuous in itself has been upheld,[6] and, apart from the constitutionality of national prohibition, certainly the court could not say that a method of achieving prohibition reasonable for a state is unreasonable for the nation. As for the constitutionality of national prohibition itself, the court was unanimous in upholding the War-Time Prohibition Act; the least the *Hamilton* case[7] can stand for is that, if the war emergency exists, prohibition is a constitutional way of meeting it. The real issue in *Ruppert* v. *Caffey*, then, is clear — is it for the court to decide whether or not the war emergency has passed?[8]

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[2] Ruppert *v.* Caffey, U. S. Sup. Ct. No. 603, October Term, 1919. The armistice with Germany was signed on November 11, 1918. The War-Time Prohibition Act, providing that after June 30, 1918, until the conclusion of the war and the termination of mobilization, the date to be proclaimed by the President, it should be unlawful to sell for beverage purposes any distilled spirits, was approved on November 21, 1918. The Volstead Act, providing that the War-Time Prohibition Act should include any liquors containing in excess of one-half of one per cent alcohol, was enacted on October 28, 1919, over the President's veto.

[3] Hamilton *v.* Kentucky Distilleries and Warehouse Co., Dryfoos *v.* Edwards, U. S. Sup. Ct. Nos. 589 and 602, October Term, 1919.

[4] *Supra*, note 2.

[5] Mugler *v.* Kansas, 123 U. S. 623 (1887). The court, in construing the Fourteenth Amendment, has often referred to cases under the Fifth; Mr. Justice Brandeis, in his opinion in the *Hamilton* case, inverts the process.

[6] Purity Extract Co. *v.* Lynch, 226 U. S. 192 (1912).

[7] *Supra*, note 3.

[8] Mr. Justice McReynolds, in his dissenting opinion, says, "The power of Congress recognized in *Hamilton, Collector, etc.* . . . should be restricted to actual necessities consequent upon war. . . . Whether these essentials existed when a measure was enacted or challenge presents a question for the courts."

Of all questions of fact, it would seem that this is peculiarly appropriate for Congress, and peculiarly inappropriate for the court.[9] Mr. Justice McReynolds, in his dissenting opinion, attempts to draw a distinction between the scope to be allowed Congress in the exercise of an express power and that to be allowed it in the exercise of an implied power. That attempted distinction Mr. Justice Brandeis effectively explodes. In the first place, it is hard to see why the power to pass acts for the carrying on of war is not expressly given to Congress;[10] in the second, assuming the power is only implied, the question of whether the power is there because the Constitution says it exists, or because the court says the Constitution must mean that it exists, is only a preliminary one — given the existence of the power, the court has only one standard for deciding how far it goes.

Whether peace has come is not a question of fact but a question of expediency; not a fact, but the way facts should be met, is involved. With our troops in Siberia and on the Rhine, with the economic life of the country and of the world still profoundly disorganized, the situation at the time *Ruppert* v. *Caffey* was decided shows the wisdom of making the absence of Presidential proclamation or Congressional resolution conclusive. But the significance of the dissent in *Ruppert* v. *Caffey* is much more startling. By the narrow margin of a single vote the court has repudiated a doctrine which, applied, might make an error of the justices in prophesying the outcome of an armistice result in irreparable disaster.

"MOVABLE EFFECTS" AND STATUTORY INTERPRETATION. — The American courts have given but little conscious recognition to the competing methods of statutory interpretation which have called forth much controversy on the continent of Europe in recent years.[1] Rarely, indeed, is recognition given to the view that different modes of interpretation may lead to diverse conclusions in the decision of a particular case. Owing, perhaps, to the fact that the courts are unwilling to recognize that judicial interpretation of statutes involves, by and large, a certain amount of judicial law-making, the theory of statutory interpretation in American law has not received the critical and systematic treatment which has been given to other parts of the law.

The case of *Estate of Castle* [2] is a recent example. Here the court was

[9] In Martin *v.* Mott, 12 Wheat. (U. S.) 19 (1827), it was held that, under an act of Congress passed under its constitutional power to provide for the calling forth of the militia, giving the President power to call forth the militia in an emergency, not only was the action of the President in calling it out not reviewable, but the avowry was not defective in not stating that the emergency existed.

[10] "The Congress shall have power to declare war . . . to raise and support armies, . . . to provide and maintain a navy . . . and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." Art. I, Section 8, of the Constitution.

[1] See Roscoe Pound, "Enforcement of Law," 20 GREEN BAG, 401. For more extended discussions of the subject, see GENY, MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF, 2 ed., Paris, 1919; SCIENCE OF LEGAL METHOD (The Modern Legal Philosophy Series, Vol. IX), Boston, 1917, Part I.

[2] 25 Hawaii, 38 (1919).

called upon to determine whether insurance policies procured by a married man upon his life, payable to his personal representatives, were a part of his "movable effects, in possession or reducible to possession, at the time of his death," under a Hawaiian statute giving the widow dower.[3] The case raises several interesting questions:

(1) Were these policies of insurance a part of the husband's "effects"? The court intimates that they were not, in the following language: "The right to the amount due upon the policy does not come into existence until after the death of the insured. The money belongs to the insurer who is charged with the duty created by the contract to pay the beneficiaries. The only thing which the insured can grant is an interest in the contract."[4] The modern conception of a "right" is that it is a legally protected interest.[5] That the insured has such an interest in the contract of insurance (at least, where it is payable to his estate or his personal representative) is shown by the fact that the policy may be subjected to the payment of his debts,[6] and will pass to his assignee in bankruptcy.[7] While the insured does not ordinarily obtain the face amount of a straight life or limited payment policy, because the amount is not payable until after his death, yet in exceptional cases he may claim the full amount.[8] It seems difficult to contend, then, that the insured in the principal case did not have a chose in action which was a part of his property[9] and of his "effects."[10]

(2) Was the insurance policy a part of his "*movable* effects"? The method of statutory interpretation adopted by the court is predominantly "analytical."[11] That is, the court treats the statute as an expression of the will of the legislature which created law as of the date of its enactment, and the only function which the court assumes is that of ascertaining by a purely logical process the legislative will so expressed.

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[3] The statute (REVISED LAWS OF HAWAII, 1915, § 2977) reads: "Every woman shall be endowed of one-third part of all the lands owned by her husband at any time during marriage, in fee simple, in freehold, or for a term of fifty years or more, so long as twenty-five years of the term remain unexpired, but in no less estate, unless she is lawfully barred thereof; she shall also be entitled, by way of dower, to an absolute property in the one-third part of all his movable effects, in possession, or reducible to possession, at the time of his death, after the payment of all his just debts."

[4] 25 Hawaii, 41 (1919).

[5] See Roscoe Pound, "Legal Rights," INT. JOUR. ETHICS, October, 1915, pp. 92–116; BEALE, A TREATISE ON THE CONFLICT OF LAWS, § 139.

[6] See RICHARDS, INSURANCE, 3 ed., §§ 71, 72.

[7] United States Bankruptcy Act of 1898 (30 STAT. AT L. 566), § 70*a*, 1 FED. STAT. ANN., 2 ed., 1196; Hiscock *v.* Mertens, 205 U. S. 202 (1906). See JOYCE, INSURANCE, 2 ed., § 2341.

[8] Thus, in People *v.* The Knickerbocker Life Insurance Co., 40 Hun (N. Y.), 44 (1886), the insurer became insolvent, and the insured being so aged and afflicted as to make it impossible for him to procure other insurance, the court held that the referee properly allowed his claim as for a death claim.

[9] See Williston, "Can an Insolvent Debtor Insure his Life for the Benefit of his Wife?" 25 AM. L. REV. 185, 187; RICHARDS, note 6, *supra*.

[10] See 1 BOUVIER'S LAW DICTIONARY, Rawle's ed., 975. In Schondler *v.* Wace, 1 Camp. 487, 488 (1808), Lord Ellenborough held that an insurance policy was a part of a bankrupt's "effects" within the meaning of the English bankruptcy statute.

[11] See Pound, "Enforcement of Law," 20 GREEN BAG, 404. See JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW, 1909, § 370, for a statement of the fundamental misconception of this method of interpretation. *Cf.* 2 AUSTIN, JURISPRUDENCE, 4 ed., 1023–1036.

The question is as to the meaning of the word "movable" at that date. The "common law of England, as ascertained by English and American decisions," is adopted as the common law of the Territory of Hawaii.[12] It seems clear that neither "movable" nor "movables" is a "word of art" in Anglo-American common law.[13] The classic division of property in our law is that into "real" and "personal." Probably this distinction originated historically in the "physical difference between immovable land or tenements and movable articles or chattels" which "was at the bottom of Bracton's test for the classification of actions,"[14] but the modern terms "real" and "personal" do not coincide with "immovable" and "movable," respectively.[15] Is an insurance policy a "movable" in the ordinary sense? It may be noted that the written policy is not a specialty,[16] but is treated merely as evidence of the contract between the insured and the insurer.[17] Hence, the insured's property was not in the written document but in the chose in action of which it was evidence. Several ingenious arguments have been advanced to show that choses in action are to be classed as "movables" in the ordinary sense of the term. Thus, it has been argued that since the right is immediately against a person and since persons are movable and can change their residences at will, the right itself is "movable."[18] A sufficient answer to this reasoning is, that not all persons are "movable" (*e.g.*, municipal corporations), and that, moreover, the immediate object of a right *in personam* is not the person of the obligor.[19] Another line of reasoning is that the object of the right is the will or act of the person obliged,[20] and that obligations which involve the doing or not doing of an act are, accordingly, "movable."[21] In truth, however, the terms "movable" and "immovable" are strictly applicable, in their ordinary meanings, only to corporeal objects, not to abstract incorporeal rights, such as choses in action;[22] and from the "analytical" point of view the decision in the principal case is correct.[23]

The "historical" method of interpretation of statutes involves an inquiry into the previously existing law, of which the statute is regarded as a continuation and development.[24] The original provision as to dower

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[12] See 1915 Rev. Laws, § 1: "The common law of England, as ascertained by English and American decisions, is declared to be the common law of the territory of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States or by the laws of the territory of Hawaii or fixed by Hawaiian judicial precedent or established by Hawaiian usage."

[13] Strong *v.* White, 19 Conn. 238 (1848).

[14] T. Cyprian Williams, "The Terms Real and Personal in English Law," 4 L. Quart. Rev. 394, 407.

[15] See Williams, note 14, *supra*. Holland, Jurisprudence, 10 ed., 100.

[16] See 32 Harv. L. Rev. 1, 10; 33 Harv. L. Rev. 198, 200.

[17] *Ibid.*

[18] See 1 Joannis Voet, Comm. ad Pand., 1 ed., p. 8, § 21 (1698). The reference is to the fifth edition, 1827.

[19] See 1 Wächter, Pandekten 285, note (1880).

[20] *Ibid.*

[21] See 1 Planiol, Traité Élémentaire de Droit Civil, 6 ed., No. 2232.

[22] 1 Planiol, *supra*, No. 2195; 1 Dernburg, Pandekten, 7 ed., § 74.

[23] Strong *v.* White, *supra*, note 13; Jackson *v.* Vanderspreigle, 2 Dall. (U. S. Sup. Ct. Pa.) 142 (1792) ("movable" in will; rule of *ejusdem generis* applied). But see Penniman *v.* French, 17 Pick. (Mass.) 404 (1835).

[24] See note 11, *supra*.

in Hawaii gave the widow a life estate in one third of the husband's "immovable and fixed property," and an absolute property in one third of his "movable effects." [25] This provision was a part of the compilation of laws made by John Ricord, a former member of the bar of New York, who was appointed Attorney-General of the kingdom in 1844.[26] Prior to its adoption the islands had no coherent body of law.[27] These statutes were translated into the native language by a clergyman, Rev. William Richards.[28] While the compilation is evidently based upon the English common law,[29] yet the courts were authorized to cite and adopt "the reasonings and analogies of the common law and of the civil law . . . so far as they are deemed to be founded in justice, and not at conflict with the laws and usages of this kingdom." [30] Whether or not the terms "immovable" and "movable" [31] were consciously borrowed from the civil law [32] or were adopted as a result of the exigencies of translation into the native language,[33] the court, adopting the analogy of the civil law, could readily have found that the term "movable effects" in the dower statute had a *technical* meaning which included choses in action. Thus, by the French Civil Code, the division of property into "immovables" (*immeubles*) and "movables" (*meubles*) is exhaustive, and the latter clearly embraces choses in action for a money payment;[34] and this classification is recognized in those states of the United States which have adopted codes derived in part from the French Code.[35] In nineteenth-century German law, too, the term "movable thing" (*bewegliche Sache*) included a chose in action.[36] When, therefore, in 1859 the dower

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[25] See 1 STATUTE LAWS OF HIS MAJESTY KAMEHAMEHA (1846), § IV, p. 59.

[26] See JAMES JACKSON JARVES, HISTORY OF THE HAWAIIAN ISLANDS, 3 ed., 190.

[27] See JARVES, *supra*, 199.

[28] See 1 STATUTE LAWS, ETC., preface, 6.

[29] *Ibid.*, 7.

[30] 2 STATUTE LAWS OF HIS MAJESTY KAMEMAHEHA III (1847), 5. (In Matter of Vida, 1 Haw. 63 (1852), the court refused to be bound by the English common-law definition of "immovable and fixed property" and held that a widow was entitled to dower in a leasehold. The English common law was not adopted until January 1, 1893. See LAWS OF 1892, chap. 57, § 5; Mossman *v.* Hawaiian Government, 10 Hawaii, 421, 436 (1896).

[31] In 1 STATUTE LAWS OF HIS MAJESTY KAMEHAMEHA III (1846), § III, p. 58, the husband's marital property rights are defined in terms practically identical with those of the common law, except that "immovable" and "movable" are everywhere substituted for "real" and "personal."

[32] American lawyers of the early nineteenth century were perhaps more familiar with the civil law than are those of to-day. See Pound, "The Philosophy of Law in America," 7 ARCHIV FÜR RECHTS- UND WIRTSCHAFTSPHILOSOPHIE, 385, 391.

[33] The terms "immovable" and "movable" may have been more readily translatable into the native language than such artificial terms as "real" and "personal." The conjecture is strengthened by the fact that in an opinion given in 1844, Attorney-General Ricord said: "The third part of the real property goes to the widow as a mere life estate, and the third part of the personal property goes to her absolutely." Matter of Vida, 1 Hawaii, 63, 64 (1852).

[34] See FRENCH CIVIL CODE, Arts. 527, 529; 1 PLANIOL, TRAITÉ ELÉMENTAIRE DE DROIT CIVIL, 6 ed., No. 2249; 1 BAUDRY-LACANTINERIE, PRÉCIS DE DROIT CIVIL, 12 ed., Nos. 1271, 1304.

[35] See CIVIL CODE OF LOUISIANA, Art. 474 (466); CALIFORNIA CIVIL CODE, §§ 657, 663; NORTH DAKOTA COMPILED LAWS, 1913, §§ 5248, 5253; SOUTH DAKOTA CIVIL CODE, §§ 185, 190. In reference to the three last named, *cf.* DAVID DUDLEY FIELD'S DRAFT CIVIL CODE FOR NEW YORK, § 162.

[36] ARNDTS, LEHRBUCH DER PANDEKTEN, 10 ed., § 50; 1 WINDSCHEID, LEHRBUCH

statute was given its present form by the substitution of common-law terms for "immovable and fixed property,"[37] the term "movable effects" continued to have its original meaning; nor was this changed by implication when the Anglo-American common law was adopted in 1893.[38]

A third method, or rather tendency, in statutory interpretation, called the "equitable," "conceives of the legislative rule as a general guide to the judge, leading him toward the just result,"[39] but insists that within wide limits he shall use his discretion in bringing about such a result. Thus, one representative of this school or tendency has argued that in case the judge has to choose between two competing interpretations, he should choose that one which is most in accordance with the "social ideals of the epoch."[40] One needs no argument to prove that the extension of married women's property rights is an ideal of the modern epoch, and the court in the principal case should therefore have adopted the more extensive interpretation. Or, if one dislikes the flavor of novelty in this suggestion, one can resort to no more modern a person than Lord Coke for the principle that "three things be favored in law: life, liberty and dower"[41]—a maxim approved by the Hawaiian court in an earlier case.[42]

(3) The words "in possession, or reducible to possession," in the statute do not exclude the possibility of its extending to choses in action; rather they are indicative of a survival of the primitive conception of a chose in action as a proprietary right. The early English law treated the action of debt as proprietary; the defendant was conceived of as having in his possession something belonging to the plaintiff which he ought to surrender.[43] The abstract idea of a chose in action as a *vinculum juris* comes from the Roman law, and in Blackstone's time had hardly ousted the primitive concept from English legal parlance.[44] The Hawaiian Court in 1893 defined a chose in action as "a right not reduced to possession."[45] Here again the analytical method of interpretation seems inferior to the historical.

It is submitted, therefore, that the decision in the principal case is not well grounded.

AGENT'S LIABILITY ON CONTRACTS MADE FOR UNDISCLOSED PRINCIPAL. — It is always easy for an agent in making a simple contract to avoid liability. He may do so by signifying that he is not to be held,[1] or,

DES PANDEKTENRECHTS, 6 ed., § 139, note 5. The terms *res immobiles* and *res mobiles* in the Roman law probably extended only to corporeal things. See the last two citations and PLANIOL, *supra*, No. 2195.

[37] See CIVIL CODE OF THE HAWAIIAN ISLANDS, 1859, § 1299.

[38] See note 30, *supra*.

[39] See Pound, "Enforcement of Law," 20 GREEN BAG, 405.

[40] See Stammler, "Wesen des Rechts und der Rechtswissenschaft," in SYSTEMATISCHE RECHTSWISSENSCHAFT (1913), 1-65, especially 44-45 and 56-57.

[41] See 2 COKE UPON LITTLETON, c. 11, 124*b*.

[42] Matter of Vida, 1 Hawaii, 63, 65 (1852).

[43] See AMES, LECTURES ON LEGAL HISTORY, 88.

[44] 2 COMM. 397.

[45] *In re* Kealiiahonui, 9 Hawaii, 1, 6 (1893), quoting ANDERSON'S LAW DICTIONARY. Similar language is used in 2 BOUVIER'S DICTIONARY 2265 (1914).

[1] See 1 WILLISTON, CONTRACTS, § 285.

if acting within his authority, by merely revealing the fact of agency and the identity of his principal.[2] Where the principal is disclosed, reliance is ordinarily placed upon his credit alone, and the agent will not be held liable to the other contracting party unless clear proof is shown of an intent to substitute or add[3] the agent's liability for or to that of the principal.[4]

A willing agent who conceals the name of his principal or the entire fact of agency while making a contract is likely to find himself later in court answering personally for non-performance and unable to shield himself by showing that he acted within the scope of his employment. Thus, in a recent New York case[5] the action was on a written contract in which the defendant described himself as "Louis N. Shour, manufacturers' selling agent," and signed "L. N. Shour." The agent acted for an undisclosed principal and was held in damages for nondelivery under the contract. This result reached by the courts in cases of such contracts, written or oral, is substantially the same whether the principal was partly undisclosed[6] (his identity not revealed) or wholly undisclosed[7] (fact of agency also concealed[8]). But, on examination, the reasons appear to be different.

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[2] Owen *v.* Gooch, 2 Esp. 567 (1797); Whitney *v.* Wyman, 101 U. S. 392 (1879). See 2 KENT, COMM., Lect. XLI, p. 630.

[3] McCarthy *v.* Hughes, 36 R. I. 66, 88 Atl. 984 (1913).

[4] See Gerloff *v.* Carleton, 121 N. Y. Supp. 338, 339 (1910).

In every case in the light of its circumstances the question must be considered as to where reliance was placed by the contracting party, whether on the agent, or on the principal, or on both. Graham *v.* Stamper, 2 Vern. 146 (1690); Goodenough *v.* Thayer, 132 Mass. 152 (1882). See Boyd Grain Co. *v.* Thomas, 142 S. W. (Ark.) 1150 (1912). See also STORY, AGENCY, § 263.

An exception was early made in England in the case of a foreign principal, in which case the court presumed that, even though the foreign principal was named, reliance was placed upon the credit of the domestic agent. Die Elbinger Actien-Gesellschaft *v.* Claye, L. R. 8 Q. B. 313 (1873). See Thomson *v.* Davenport, 9 B. & C. 78, 86 (1829). This rule of presumption has been adopted only to a very slight extent among the United States. Vawter *v.* Baker, 23 Ind. 63 (1864); McKenzie *v.* Nevius, 22 Me. 138 (1842); Merrick's Estate, 5 W. & S. (Pa.) 9 (1842). See Hochster *v.* Baruch, 5 Daly (N. Y.), 440 (1874). The rule seems, moreover, to have been discredited in England of late. Miller, etc. Co. *v.* Smith & Tyrer, [1917] 2 K. B. 141. See Reading, C. J., in Brandt *v.* Morris, [1917] 2 K. B. 784, 792.

[5] Levy *v.* Shour, 178 N. Y. Supp. 227 (1919).

[6] In the following American cases the agents of partly undisclosed principals were held liable on simple contracts, either oral or in writing: Cooley *v.* Ksir (oral), 105 Ark. 307, 151 S. W. 254 (1912); McClure *v.* Central Trust Co. (written), 165 N. Y. 108, 58 N. E. 777 (1900); Davenport *v.* Riley (oral), 2 McCord (S. C.) 198 (1822). *Cf.* State *v.* Neelly, 60 Ark. 66, 28 S. W. 800 (1894). Other cases are collected in 1 WILLISTON, CONTRACTS, § 285, note 90; 1 MECHEM, AGENCY, § 1411.

In a recent English case the Court of Appeals refused to hold the agent of a partly disclosed principal on a simple contract in writing. Miller, etc. Co. *v.* Smith & Tyrer, [1917] 2 K. B. 141. See also Fleet *v.* Murton L. R. 7 Q. B. 126, 129 (1871); Pike *v.* Ongley, 18 Q. B. D. 708, 712 (1887).

[7] Jones *v.* Littledale (written), 1 N. & P. 677 (1837); Magee *v.* Atkinson (written), 2 M. & W. 440 (1837); Bartlett *v.* Raymond (oral), 139 Mass. 275, 30 N. E. 91 (1885); Meyer *v.* Redmond (written), 205 N. Y. 478, 98 N. E. 906 (1912). See collections of cases in 1 WILLISTON, CONTRACTS, § 284; 1 MECHEM, AGENCY, § 1410.

[8] Within this group fall cases where the agent in contracting has used no more than such phrases as "A, agent," or "A, broker." These words are regarded as mere *descriptio personae* and their use does not reveal the fact of agency. See 1 MECHEM, AGENCY, §§ 1408, 1410.

As the doctrine of the undisclosed principal has not been applied by the courts to sealed instruments [9] or to negotiable paper,[10] these two types of contracts will not be considered.

A, within the scope of his authority in fact, makes a simple contract with T, oral or in writing, expressly on behalf of his principal, but he does not name his principal P. In all common-law jurisdictions this partly undisclosed principal may be held,[11] and by American courts A is held.[12] However, little attention has been paid to the reason, if any, why both are responsible at T's election [13] on one contract. Looking at the apparent, expressed intent of the parties, it is clear on principles of contract that the undertaking is between T and P. There is no difficulty in a man contracting with whatever individual, firm, or corporation A is representing, provided he seems to mean that, and by the wording of his contract in this case such appears to be T's intent.[14] P, in our case, has authorized T to do exactly what he did. P's liability can thus be disposed of as contractual. But should A likewise be held at T's election? Unless there are circumstances which show that reliance was placed on A's credit and A thereby became a joint party to the contract, it is believed that there is no need at all for a rule that will hold A on such contracts.[15] This is the English method of approach.[16]

But suppose an agent in contracting acts contrary to the exact letter of his principal's instructions, though within the scope of his apparent authority. As the law stands, the principal is liable,[17] and doubtless the agent would be made to answer in contract by those courts in which he would have been held if he had acted within the exact terms of his authority. It is impossible on principles of contract to find an undertaking here between the third party and the principal, for there has been an entire lack of assent on the principal's part. We are forced to look elsewhere for the means of holding the latter; and, as we shall find in the following case of the wholly undisclosed principal, where contract doctrines by themselves fail to justify the result reached, a rule of agency well established by the cases points the way.

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[9] Borcherling *v.* Katz, 37 N. J. Eq. 150 (1883).

[10] Cragin *v.* Lovell, 109 U. S. 194 (1883).

[11] Thomson *v.* Davenport (oral), 9 B. & C. 78 (1829); Pentz *v.* Stanton (oral), 10 Wend. (N. Y.) 271 (1833); Isham *v.* Burgett (written), 157 Mass. 546 (1893). *Cf.* Rodliff *v.* Dallinger, 141 Mass. 1, 4 N. E. 805 (1886). See 1 WILLISTON, CONTRACTS, § 287; 2 MECHEM, AGENCY, § 1731.

[12] See note 6, *supra.*

[13] As to what constitutes an election, see 2 WILLISTON, CONTRACTS, § 289; 2 MECHEM, AGENCY, §§ 1754–1762.

[14] "But there is no rule of law that makes it impossible to contract with or sell to an unknown but existing party." Holmes, J., in Rodliff *v.* Dallinger, 141 Mass. 1, 5, 4 N. E. 805, 807 (1886).

[15] The surprisingly small number of actions brought in the courts against agents supports this contention.

Where the agent acts as agent but for an unidentified and irresponsible principal the agent is held anyhow, since it is to be presumed that the agent and the third party intended to make a contract, and as the principal is irresponsible in law the agent is the only available contractor. See 1 MECHEM, AGENCY, § 1389 and cases there cited. *Cf.* Lyon *v.* Williams, 5 Gray (Mass.), 557 (1856).

[16] See English cases cited in preceding notes.

[17] Brooks *v.* Shaw, 197 Mass. 376, 84 N. E. 110 (1908); Hubbard *v.* Tenbrook, 124 Pa. St. 291, 16 Atl. 817 (1889); Kinahan *v.* Parry, [1910] 2 K. B. 389; Watteau *v.* Fenwick [1893], 1 Q. B. 346. See Mechem, 23 HARV. L. REV. 513, 590, 599.

A, within the scope of his actual and apparent authority, makes a contract with T, oral or in writing,[18] in his own name but in fact on behalf of P, his wholly undisclosed principal. On the authorities either A[19] or P[20] may be held at T's election. That the principal should be liable is obviously fair. In the commercial world it is just as "plain commonsense"[21] that an undisclosed principal on discovery should be answerable as that a disclosed principal should be. It is his business back of the contract; his is the benefit and he should pay. Yet the well-settled rule of the cases which binds the wholly undisclosed principal has been proclaimed by eminent judges and writers to be an "anomaly" in our law.[22] So it is worth noting how the doctrine has been evolved.

The wholly undisclosed principal was first allowed his action, it is believed, in 1709.[23] A century before that, however, it had been said that the master and servant are "fained to be all one person;"[24] and as early as 1305[25] the maxim "qui facit per alium facit *per se*" had taken root in our law. Throughout the intervening centuries has grown in its various phases the doctrine of agency by which one not answerable on principles of contract or tort is held, where in fairness he should be held, for the act of another, his agent. This doctrine of identity of principal and agent resolves itself, in the case that concerns us, to this, — that the act of the agent in making the contract will be considered the act of the principal.[26] It is therefore the principal's contract, and on it the courts hold him. It would seem that after this step by a court there is no room

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[18] In the case of a simple contract in writing made in the agent's name but in fact on behalf of a principal whose name or whose existence is not disclosed in the writing even though known to all parties, oral evidence is not admissible to relieve the agent of liability on the contract. Jones *v.* Littledale, 6 Ad. & El. 486 (1837); Magee *v.* Atkinson, 2 M. & W. 440 (1837); Higgins *v.* Senior, 8 M. & W. 834 (1841); Cream City Glass Co. *v.* Friedlander, 84 Wis. 53, 54 N. W. 28 (1893). But it is received to charge the principal. Byington *v.* Simpson, 134 Mass. 169 (1883). See Higgins *v.* Senior, *supra*, at p. 844; Jones *v.* Littledale, *supra*, at p. 490; Ford *v.* Williams, 21 How. (U. S.) 287, 289 (1858); Wilson *v.* Hart, 7 Taunt. 295, 304 (1817). See also 2 SMITH'S LEADING CASES, 11 ed., p. 403 ff., note to Thomson *v.* Davenport.

[19] See note 7, *supra*.

[20] Kayton *v.* Barnett (oral), 116 N. Y. 625 (1889); Lerned *v.* Johns (written), 9 Allen (Mass.), 419 (1864); Watteau *v.* Fenwick (oral), *supra*. See long lists of cases in 1 WILLISTON, CONTRACTS, § 286; 2 MECHEM, AGENCY, § 1731.

[21] Holmes, 5 HARV. L. REV. 1.

[22] Lords Davey and Lindley in Keighley *v.* Durant, [1901] A. C. 240, 256, 261, 262; TIFFANY, AGENCY, 231, 232; HUFFCUT, AGENCY, § 118; Pollock, 3 L. QUART. REV. 359.

Professor Ames treats the rule as an anomaly but would justify the result as a short cut to allowing the third party to reach in the agent's hands the agent's asset in equity of the right to exoneration. Professor Ames was thus led to disagree with the case of Watteau *v.* Fenwick, *supra*. 18 YALE L. J. 443, reprinted in AMES, LECTURES ON LEGAL HISTORY, 453.

Professor Lewis in an interesting article suggests, to avoid the anomaly, the possibility of reaching the wholly undisclosed principal as a tortfeasor, or on quasi contractual grounds. 9 COL. L. REV. 116.

[23] Garrat *v.* Cullum, Buller, N. P. 42 (1709). *Cf.* Whitecombe *v.* Jacob, 1 Salk. 160 (T. 9 Anne). See Holmes, 5 HARV. L. REV. 1, 3 *ff.*

[24] WEST, SYMBOLEOGRAPHY, Part I, § 3 (1597?–1601).

[25] "*Qui per alium facit per se ipsum facere videtur*," Hengham, C. J., in Anonymous Case, Common Pleas, 1304–05, reported in FITZHERBERT'S ABRIDGMENT, *Annuitie*, pl. 51.

[26] For the historical development of this whole matter see the very learned essay on "Agency" by Mr. Justice Holmes, 4 HARV. L. REV. 345, 5 HARV. L. REV. 1.

on the contract for the agent. As the third party intended to have only one person on the contract with him, unless he will be made to suffer by the adoption of the rule of agency that the principal will be regarded as that person, there seems no reason for giving the third party a windfall which logic and reason do not support.[27] But the courts, though there have been but few cases, do hold the agent on the undertaking,[28] thus in effect keeping him on the contract as an extra party, for good measure. Theoretically, the agent's liability in the extraordinary situations in which it is to the interest of the third party to pursue him instead of his principal should be in tort, or the result of an estoppel.

There may be some who have difficulty in recognizing that, when all arrangements are made by an agent possessed of an intellect and free will, a contract can be effected between a third party and a partly undisclosed, or even a wholly disclosed principal. For them it is suggested that the line of thought shown here in the case of the wholly undisclosed principal resting upon the doctrine of identity might be utilized to cover all three types of principals. The result then urged would be this, that the moment an agent enters the field of contracts, as when he enters the field of torts, the doctrine of *respondeat superior* accompanies him in his dealings and, by its strength alone, adds the responsibility of another party, the principal, to the responsibility already resting upon the agent in contract or tort.

SILENCE AS ACCEPTANCE IN THE FORMATION OF CONTRACTS. — "He who remains silent certainly does not speak; but nevertheless it is true that he does not deny."[1] The situation expressed by this truism has been the source of considerable confusion in our law of contracts. The decisions are almost as varied as the jurisdictions, and nowhere do we find an adequate analysis of the questions involved or the principles upon which they must be decided. Though acceptance of an offer is usually made by spoken or written words, quite often the offer may call for an act or authorize some other mode of acceptance. As the offeror is the "czar of his offer" such acts, when induced by the offer,[2] constitute an

[27] "The rule is probably the outcome of a kind of common-law equity, powerfully aided and extended by the fiction of the identity of principal and agent and the doctrine of reciprocity or mutuality of contractual obligations," HUFFCUT, AGENCY, § 120, speaking of the liability of the wholly undisclosed principal and of his right to sue.

[28] Of the cases in note 7, *supra*, Jones *v.* Littledale and Magee *v.* Atkinson were actions of assumpsit; Bartlett *v.* Raymond was "contract for goods sold and delivered." The action in Meyer *v.* Redmond brought under the New York Code is described by Haight, J., in the opening of his opinion at p. 480, as follows: "This action was brought to recover damages which the plaintiff is alleged to have suffered by reason of the failure of the defendants to perform their contract."

[1] Digest, L, 17, 142 (Paulus). See POUND, READINGS IN ROMAN LAW, 2d. ed., 25–26.

[2] If the act is performed in ignorance of the offer, as where a reward is offered for the capture of a felon, there is no contract. Ball *v.* Newton, 61 Mass. 599 (1851); Fitch *v.* Snedaker, 38 N. Y. 248 (1868); Williams *v.* West Chicago St. Ry. Co., 191 Ill. 610, 61 N. E. 456 (1901). The English courts have entertained a contrary view. Williams *v.* Carwardine, 4 B & Ad. 621 (1833); Gibbons *v.* Proctor, 64 L. T. (N. S.) 594 (1891). Also, if the offeree expressly states that his acts are not performed in accept-

acceptance.[3] In such cases there is something external by which to judge the intent of the parties. But where the mere passive conduct of the offeree is claimed to be an acceptance, the question is more difficult.

In considering this problem, some difficulty has arisen because of the failure of the courts to consider the difference between an offer for a unilateral and one for a bilateral contract and the difference in the situations produced thereby. In the case of the former the courts often have allowed recovery, purportedly on the basis of contract, which can be justified only on some other ground. If A sends goods to B under a contract which is later rescinded by agreement and A tells B that he must pay a certain sum in cash or return the goods, the mere retention of the goods by B[4] does not constitute a contract.[5] B has performed neither of the alternatives contained in the offer. True, he may be held liable because of his duty to return the goods, but such liability must be founded upon the conversion of the goods or in quasi contract for their value. Even from an objective standard, the contract does not comply with the terms of the offer. However, where the "acceptance" if effective would create a contract executory on both sides, we have presented the unavoidable question, May silence be construed as acceptance?[6]

The problem may arise with the offeree as the plaintiff. Where the offer authorizes an ambiguous act as acceptance, the performance of such an act with the intent to comply with the offer creates the contract.[7] It is not sufficient to answer that the proof of intent is more or less within the arbitrary power of the offeree; the offeror must have understood the situation he was creating. Likewise, where the offer expressly or impliedly authorizes silence as acceptance, such passive conduct on the part of the offeree in compliance therewith should form a binding contract. But the courts seem willing to go only to this extent: That if the offeree chooses to make acceptance in the manner thus authorized, the offeror has but himself to blame if the situation is unsatisfactory, but that the offeror cannot by his own act put the offeree in the position

ance of the offer, there is no contract. Lamson Consolidated Co. *v.* Weil, 15 Daly, 498, 8 N. Y. Supp. 336 (1890).

[3] A. B. Dick Co. *v.* Fuller, 213 Fed. 98 (1914); Mooney *v.* Daily News Co., 116 Minn. 212, 133 N. W. 573 (1911); De Wolf Co. *v.* Harvey, 161 Wis. 535, 154 N. W. 688 (1915).

[4] These were substantially the facts in Wheeler *v.* Klaholt, 178 Mass. 141 (1901). Yet the court held that there was a contract, Holmes, C. J., saying: "A jury would be warranted in finding that a neglect of the duty to return imported an acceptance of the alternative offer to sell" (p. 145). This ignores the stipulation as to cash. It seems clear that the offeree could not, by mere retention of the goods, have effected a contract when the offer was for cash only.

[5] A distinction must be made between promises "implied in fact" and those "implied by law." Thus, if A does work for B, with the latter's knowledge, but without any express request, and B accepts the work or its results, by pure inference of fact B's conduct is acceptance. But if B does not know of the work, the only basis of liability is in quasi contract upon the promise "implied by law" to prevent unjust enrichment. See Day *v.* Caton, 119 Mass. 513, 516 (1876).

[6] Here recovery must be had, if at all, upon principles of contracts and may not well be confused with recovery in tort or in quasi contract.

[7] Where the act is performed without intent to accept the known offer, there is no contract, as is illustrated by the "reward cases." Hewitt *v.* Anderson, 56 Cal. 476 (1880); Vitty *v.* Eley, 51 App. Div. (N. Y.) 44 (1900). Where similar acts are done with intent to accept, there is a contract. Wentworth *v.* Day, 44 Mass. 352 (1841); Cummings *v.* Gann, 52 Pa. St. 484 (1866).

where he must speak or by his silence create a contractual obligation.[8] It will be noted that the tendency in this view is to make the situation one-sided. In practical effect, there is a contract only if the offeree chooses so to consider it. This puts one partly unfairly at the mercy of the other.

To remedy this injustice the common-law courts say that where the offeror is the plaintiff, silence by the offeree will constitute acceptance if there is a *duty* to speak, as distinguished from the mere right.[9] But from what does this duty arise? An examination of the cases shows that the word is used, not in the sense of a legal obligation, but, morally, a duty of conscience.[10] The theory seems to be something akin to estoppel. Thus, in a recent case [11] the offeree was held to have been under a duty to notify the offeror of his rejection of an offer which he had induced. It seems illogical and extremely unsatisfactory to consider that one can be estopped into a contract except in the general sense that the standard for the legal significance of all conduct is external. Estoppel in any other sense is the last refuge of a mind predetermined by a hard case and should have no place in the formation of contractual obligations.[12]

In the civil law, notwithstanding its usual subjective standard, conduct, which in the ordinary experience of life would be taken as acceptance, so is treated. Silence is acceptance when in honest and practical understanding it would be so considered.[13] It is submitted that this test is more in accord with our objective standard than the test of moral duty. Further, it can be applied more easily and practicably to the individual situation. It would seem that this view is, in effect, supported by many decisions, though the principle is not clearly stated. Thus, an unbroken line of decisions [14] holds that one who with knowledge re-

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[8] See Felthouse *v.* Bindley, 11 C. B. (N. S.) 869 (1862); *In re* Empire Assurance Corp., L. R. 6 Ch. 266 (1871); Prescott *v.* Jones, 69 N. H. 305, 41 Atl. 352 (1898).

[9] Day *v.* Caton, 119 Mass. 513 (1876); Emery *v.* Cobbey, 27 Neb. 621, 43 N. W. 410 (1889); Robertson *v.* Tapley, 48 Mo. App. 239 (1891). "It is difficult to understand how a legal liability can arise out of the mere silence of the party sought to be affected unless he was subject to a duty of speech, which he neglected to the harm of the other party." Royal Ins. Co. *v.* Beatty, 119 Pa. St. 6, 9, 12 Atl. 607 (1888).

[10] "He who is silent when conscience requires him to speak, shall be debarred from speaking when conscience requires him to be silent." Nicholas *v.* Austin, 82 Va. 817, 825, 1 S. E. 132, 137 (1887). "But if silence may be interpreted as assent where a proposition is made to one which he is bound to deny or admit, so also it may be if he is silent in the face of facts which fairly call upon him to speak." Day *v.* Caton, 119 Mass. 513, 515 (1876).

[11] Cole-McIntyre Norfleet Co. *v.* Holloway, 214 S. W. (Tenn.) 817 (1919). For a statement of this case, see RECENT CASES, *infra*, p. 614.

[12] "There is, indeed, in a case of this kind some reason for urging that the party making the revocation should be estopped to claim that his attempted withdrawal was not binding upon himself; but this could not be done without infringing upon the inexorable rule that one party to a contract cannot be bound unless the other be also, notwithstanding that the principle of mutuality thus applied may enable a party to take advantage of the invalidity of his own act." Brown, J., in Patrick *v.* Bowman, 149 U. S. 411, 424. For a discussion of the analogous question of estoppel in the case of rejection of an offer by mail see Ashley, "The Rejection of an Offer," 12 YALE L. J. 419, 423.

[13] See 1 DERNBURG, PANDEKTEN, § 86 (2); POUND, READINGS IN ROMAN LAW, 2d ed., 26.

[14] Phila. &c. R. Co. *v.* Cowell, 28 Pa. St. 329 (1857); Foster *v.* Rockwell, 104 Mass. 167, 171 (1870); Heyn *v.* O'Hagen, 60 Mich. 150, 157, 26 N. W. 861 (1886); Coffin *v.* Planters' Cotton Co., 124 Ark. 360, 187 S. W. 309 (1916).

mains silent when another purports to make a contract as his authorized agent is liable on such contract. This seems logical. Theoretically, acceptance is but the expression of a condition of the mind and may be evidenced by passive as well as by active conduct of the offeree. If, under the circumstances, in the ordinary experience of life, the honest and practical understanding of the silence would be that it meant acceptance, there is a contract. If the transaction would be held a contract at the suit of the offeree, the result should be the same if the offeror is the plaintiff. There is no necessity for loose theories of estoppel and moral duty. Judged by the usual objective standard of our law, silence as acceptance presents no difficulty other than that of mode of proof.

WHEN SHOULD *CY-PRÈS* APPLICATION OF CHARITIES BE ALLOWED?[1] —When conditions have so materially changed that it is no longer possible or expedient to devote property to the particular charity for which it was given, the question arises as to the disposal to be made of the property. If a testator, dying before the adoption of the Thirteenth Amendment, had ordered that the income of a trust he created should be used in freeing American slaves, should his heirs have taken the funds on the abolition of American slavery,[2] or should the property have been devoted to some other charity? We must also consider whether any circumstance, other than impossibility of following the donor's directions, is sufficient to justify a deviation from the original use.

A trust for charitable purposes when once created, like any private trust, is clearly irrevocable.[3] Nor does it appear that the creators of trusts or their representatives have any right, by agreement with the trustees or otherwise, to compel a different use of the trust funds or property,[4] the right to alter differing only in degree from the right to revoke. Neither can those persons who happen to be beneficiaries at a particular time give a valid assent to an alteration of the charitable use, since those beneficiaries, from the very nature of a charitable trust, do not represent all those who are likely to be benefited in the future.[5] Further, the attorney-general, though he be the general representative of the beneficiaries,[6] does not seem to be the proper person to change the

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[1] The doctrine of *cy-près* discussed here is to be distinguished from the doctrine of *cy-près* with respect to the construction of limitations of future estates. See GRAY, RULE AGAINST PERPETUITIES, 3 ed., §§ 643 *et seq.*

[2] Jackson *v.* Phillips, 14 All. (Mass.) 539 (1867).

[3] St. Joseph's Orphan Society *v.* Wolpert, 80 Ky. 86, 89 (1882); Mott *v.* Morris, 249 Mo. 137, 155 S. W. 434 (1913); Maxcy *v.* City of Oshkosh, 144 Wis. 238, 256, 128 N. W. 899, 907 (1910).

[4] Christ Church *v.* Trustees, 67 Conn. 554, 35 Atl. 552 (1896); St. Paul's Church *v.* Attorney-General, 164 Mass. 188, 41 N. E. 231 (1895). The courts readily infer an intent that the trust should be perpetual. See GRAY, RULE AGAINST PERPETUITIES, 3 ed., § 60. See also College of St. Mary Magdalen *v.* Attorney-General, 6 H. L. 189, 205 (1857); Perin *v.* Carey, 24 How. (U. S.) 465, 507 (1860); Odell *v.* Odell, 10 All. (Mass.) 1, 6 (1865).

[5] The beneficiaries of a charity trust, as a whole, are indefinite. See *Re* Lavelle, [1914] 1 I. R. 194; Dexter *v.* Harvard College, 176 Mass. 192, 57 N. E. 371 (1900); *Re* MacDowell's Will, 217 N. Y. 454, 112 N. E. 177 (1916).

[6] See *Re* Foraker, [1912] 2 Ch. 488, 492.

uses of a charitable trust.[7] As to the trustees, mere administrators of the trust, it is clear that they are given no such right.[8]

Whatever power the British parliament may have to change the uses of a charitable trust,[9] the Dartmouth College case [10] seems to have settled in the United States that any attempt by the legislature solely on its own volition to change the use of a charitable trust would constitute a violation of the contract clause of the Constitution.[11] In that case the trustees were averse to the plan proposed by the legislature, but the same result has been reached in some cases even when the trustees assented to the legislative amendments.[12] Other cases, however, have upheld the right of the legislature, when fortified by the sanction of the trustees, to effect a change.[13] It is submitted that these latter decisions represent the better view, for all parties whose interests may be affected by the change are represented when the trustees and the legislature act together, since the legislature represents the whole people, which includes the beneficiaries and the donors, and the trustees act for themselves. Granting, however, that the legislature should have this power, is it wise to confine this power solely to its will? Legislative action is always delayed and cumbersome, particularly when an exigency demands quick action. Again, the power to change is not granted as a matter of right, but rests purely within the discretion of the law-making body.

We may then inquire whether there rests any basis upon which the

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[7] No decisions have been found that the attorney-general may waive the rights of all subsequent beneficiaries. He is a proper party to file an information for the enforcement of a charity. See Ironmongers Co. *v.* Attorney-General, 2 Beav. 313, 328–332 (1840); Attorney-General *v.* Magdalen College, 18 Beav. 223, 241 (1854). And he is a necessary party to all suits in equity to carry out the provisions of a charitable trust. Strickland *v.* Weldon, 28 Ch. Div. 426 (1883); Harvard College *v.* Society for Promoting Theological Education, 3 Gray (Mass.), 280 (1855).

[8] Langdon *v.* Plymouth Congregational Society, 12 Conn. 137 (1837); Winthrop *v.* Attorney-General, 128 Mass. 258 (1880); Lakatong Lodge *v.* Franklin Board of Education, 84 N. J. Eq. 112, 116, 92 Atl. 870, 871 (1915). See also *Re* Campden Charities, 18 Ch. Div. 310, 329–330 (1881).

[9] For a discussion on the powers of the Charity Commissioners and Board of Education (educational charities) see: *Re* Campden Charities, *supra*, 331; The King *v.* Board of Education, [1910] 2 K. B. 165, 179.

[10] 4 Wheat. (U. S.) 518 (1819).

[11] The court in that case was of the opinion that the New Hampshire legislature by the proposed changes would violate the contract comprised in the grant of the charter by the British Crown to the trustees, and also, it would seem, the contract between the donors of the property and the trustees. But the case has been of great influence in discussions of the question of the right of the legislature to change charitable trusts. See the cases cited in notes 13 and 14, *infra*.

[12] State *ex rel.* Pittman *v.* Adams, 44 Mo. 570 (1869). See also Cary Library *v.* Bliss, 151 Mass. 364, 25 N. E. 92 (1890); Crawford *v.* Nies, 220 Mass. 61, 65, 107 N. E. 382, 383 (1914). In State *ex rel.* Pittman *v.* Adams, *supra*, 582, the court said: "One may do what he will with his own, and if his benevolent instincts lead him to expend his fortune for the good of others, public policy certainly requires that he should be made to feel quite secure in his benevolence. This security he can never feel, if his gift shall be subject to the changing opinions of its future administrators with the frail check only of legislative consent."

[13] Visitors and Governors of St. John's College *v.* Comptroller and Treasurer, 23 Md. 629 (1865). And see *Re* St. Mary's Church, 7 S. & R. (Pa.) 517 (1821). For the opinions of a committee, relative to a project to apply to the Rhode Island legislature for amendments of the charter of Brown University, see FINAL REPORT OF THE COMMITTEE TO CONSIDER POSSIBLE CHANGES IN THE CHARTER OF BROWN UNIVERSITY, June 16, 1910, pages 36 *et seq.*

judicial power may exercise the right in question. Donors may entirely fail to specify the particular charitable use, and in such case the English chancellor appoints a particular charity to take the gift.[14] Or if a trustee to whose discretion the expenditure for charity has been entrusted dies without indicating the particular use, the chancellor in England and some American courts frame schemes whereby the property may be devoted to charity.[15] In England the chancellor, in the exercise of royal prerogative as representative of the sovereign, under the sign-manual power, did take it upon himself to devote to a valid charity property given for one against public policy. For example, in an early case where a Jew made a testamentary gift for the advancement of the Jewish faith, which was at that time considered against public policy, the chancellor ordered the gift to be devoted to a charity under the patronage of the Church of England.[16] Although the result reached might be far from what a reasonable person could infer to have been desired by the donor, the chancellor felt justified in changing the use, for a gift to charity, it was held, tended to reconcile the soul of the donor with God, and if the gift could not take effect one way, for the sake of the donor's soul it should be made effective in another.[17] No American court has gone so far in attempts to reconcile sinners with Heaven.[18]

In the cases given above the chancellor and the courts of equity are not exercising a judicial function. While this power of devoting property to charity merely because the donor has indicated a general desire for such an application is often called the *cy-près* power, it must be distinguished from the true rule of *cy-près*, which is a rule of construction.[19] In construing the instrument whereby the gift is made, the courts often

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[14] Mills *v.* Farmer, 1 Meriv. 55 (1815); Anon., Freem. Ch. 261 (1702); Attorney-General *v.* Syderfen, 1 Vern. 224 (1683). And see *Re* Pyne, [1903] 1 Ch. 83.

[15] Attorney-General *v.* Berryman, Dick. 168 (1755); Minot *v.* Baker, 147 Mass. 348, 17 N. E. 839 (1889). *Contra*, Fontain *v.* Ravenel, 17 How. (U. S.) 359 (1854). And no scheme will be framed if discretion of the particular trustee was to have been an essential element of the charity. Rogers *v.* Rea, 98 Ohio 315, 120 N. E. 828 (1918).

[16] Da Costa *v.* De Pas, 1 Amb. 228 (1754); Cary *v.* Abbot, 7 Ves. 490 (1802). *Cf.* West *v.* Shuttleworth, 2 Mylne & K. 684 (1835). See also 8 HARV. L. REV. 69.

[17] Attorney-General *v.* Downing, Wilm. 1, 32 (1767).

[18] Robbins *v.* Hoover, 50 Colo. 610, 115 Pac. 526 (1911); Erskine *v.* Whitehead, 84 Ind. 357, 364 (1882); Bridges *v.* Pleasants, 39 N. C. 26 (1845). But the legislature may exercise the sign-manual prerogative or authorize the courts to do so. Mormon Church *v.* United States, 136 U. S. 1 (1890).

[19] In Ironmongers Co. *v.* Attorney-General, *supra*, 924, the court said: "We may look at his disposition in the will to see what his charitable inclinations were, and, having ascertained them, then we must provide something corresponding without opinion of these charitable inclinations. You cannot talk of his intention with respect to something he never contemplated. The true mode is to consider what he did and from what he did to collect what were his intentions." In Jackson *v.* Phillips, 14 All. (Mass.) 539, 580, 591 (1867), the court said: "It is . . . well settled . . . that when a gift is made to trustees for a charitable purpose, the general nature of which is pointed out, and which is lawful and valid at the time of the death of the testator, and no intention is expressed to limit it to a particular institution or mode of application, and afterwards, either by change of circumstances the scheme of the testator becomes impracticable, or by change of law becomes illegal, the fund, having once vested in the charity, does not go to the heirs at law as a resulting trust, but is to be applied by the Court of Chancery, in the exercise of its jurisdiction in equity, as near the testator's particular directions as possible to carry out his general charitable intent. . . . The intention of the testator is the guide."

find that the donor had two intentions, — a general charitable intent and a particular intent to have his gift take effect in a particular mode. If the latter becomes impossible of execution, the courts conclude that the donor intended to have his general intent accomplished even if changes were necessary as to the manner specifically directed. The courts frame a scheme for the execution of this general intent which conforms as closely as possible to the mode prescribed by the donor.[20] A more troublesome question is whether the courts should ever allow a departure from the particular mode of disposal on the ground of expediency. The authorities agree that the expediency of an alteration must be so pressing that unless a change is made the general charitable intent will be less efficiently executed than a reasonable donor would have wished. The fact, however, that the court can devise a better plan is not sufficient to warrant an alteration.[21] In the recent Massachusetts case of *Eliot* v. *Attwill*[22] the charitable trust had been created for the erection near Trinity Church and the care of a statue by St. Gaudens of the late Bishop Brooks. The administrators of the trust sought permission of the court to substitute a statue by Bela Pratt in place of that made by St. Gaudens on the ground that the former piece of sculpture was artistically the superior. The court rightly decided that the better satisfaction of the artistic sense did not warrant a deviation from the original trust. If the inexpediency of the specific manner of disposal must have been apparent to the donor, it seems clear that his directions should be strictly followed.[23] If, however, the inexpediency is due to a change of circumstances after

[20] *Re* Queen's School, Chester, [1910] 1 Ch. 796; Biscoe *v.* Johnson, 35 Ch. Div. 460 (1887); Ironmongers Co. *v.* Attorney-General, 10 Cl. & F. 908 (1844); Lewis *v.* Gaillard, 61 Fla. 819, 56 So. 281 (1911); Mason *v.* Bloomington Library Ass'n, 237 Ill. 442, 86 N. E. 1044 (1909); Kemmerer *v.* Kemmerer, 233 Ill. 327, 84 N. E. 256 (1908); Nichols *v.* Newark Hospital, 71 N. J. E. 130, 63 Atl. 621 (1906); Jackson *v.* Phillips, 14 All. (Mass.) 539 (1867); Read *v.* Willard Hospital, 215 Mass. 132, 102 N. E. 95 (1913); Richardson *v.* Mullery, 200 Mass. 247, 86 N. E. 319 (1908); Amory *v.* Attorney-General, 179 Mass. 89, 60 N. E. 391 (1901); Lynch, Trustee, *v.* So. Congregational Parish, 109 Me. 32, 82 Atl. 432 (1912); Women's Christian Association *v.* Kansas City, 147 Mo. 103, 48 S. W. 960 (1898).

It should be noted that formerly the doctrine of *cy-près* did not exist in New York. See Tilden *v.* Brown, 130 N. Y. 29, 45, 28 N. E. 880, 882 (1891). But by the Laws of 1901, p. 751, c. 291, it was provided that if the use becomes impracticable, the trustees may, at least twenty-five years after the gift has been given, apply to the court for instructions. For cases arising in New York since this statute, see: Sherman *v.* Richmond Hose Co. No. 2, 186 App. Div. 417, 175 N. Y. Supp. 8 (1919); Camp *v.* Presbyterian Soc., 105 Misc. 139, 173 N. Y. Supp. 581 (1918); Trustees *v.* Carmody, 158 App. Div. 738 (1913); Loch *v.* Meyer, 100 N. Y. Supp. 837 (1906).

In Wisconsin the existence of the *cy-près* doctrine seems uncertain. *Cf.* McHugh *v.* McCole, 97 Wis. 166, 72 N. W. 631 (1897), with Harrington *v.* Pier, 105 Wis. 485, 82 N. W. 345 (1900). And obviously the doctrine has no application in jurisdictions which do not allow or accept the doctrine of charitable uses. Tilden *v.* Brown, *supra*.

[21] *Re* Weir Hospital, [1910] 2 Ch. 124, 140. "But neither the Court of Chancery, nor Board of Charity Commissioners, which has been entrusted by statute, in regard to application of charitable funds . . . is entitled to substitute a different scheme for the scheme which the donor has prescribed in the instrument which creates the charity, merely because a coldly wise intelligence, impervious to the special predilection which inspired his liberality, and untrammelled by his directions, would have dictated a different use of his money." See also Winthrop *v.* Attorney-General, *supra*.

[22] 122 N. E. 648 (Mass.). For a statement of the facts, see RECENT CASES, 607 *infra*.

[23] *Re* Weir Hospital, *supra*, Harvard College *v.* Attorney-General, 228 Mass. 396, 117 N. E. 903 (1917).

the donor's death, the courts should presume that he, as a reasonable man, would prefer changes whereby his general intent would be more efficiently executed to strict obedience to his directions.[24] Moreover, equity does not enforce bequests subject to freakish conditions or uses, such as a gift to a school with a provision that the descendants of certain persons should be excluded therefrom for one hundred years,[25] or a devise of a house on trust with directions that it be bricked up for twenty years.[26] In refusing to enforce these, equity prevents needless economic waste. For the same reason equity should not insist upon literal obedience to the terms of a charitable trust when, with advancement in civilization, the wisdom of the particular manner of use prescribed is denied or seriously questioned, or when the execution of the particular intent becomes economically wasteful to a considerable degree.[27]

DEDUCTION FOR BENEFITS RECEIVED BY THE PURCHASER ON RESCISSION FOR BREACH OF WARRANTY. — All courts agree that rescission will not be granted where any benefit that has been received under the contract cannot be restored.[1] The difficulty, however, lies in defining precisely what constitutes a sufficient benefit to bar rescission. In England the most nominal benefit has been held enough,[2] while the United States courts have given a less literal interpretation to the term.[3] If this rule is strictly applied to the law of sales, it may be said that in every case where title has passed the purchaser must have received some

[24] In the following *cy-près* application was allowed, although literal obedience was still possible. Attorney-General *v.* Haberdashers' Co., 3 Russ. 530 (1825); Tincher *v.* Arnold, 147 Fed. 665 (1906); Norris *v.* Loomis, 215 Mass. 344, 102 N. E. 419 (1913); Ely *v.* Attorney-General, 202 Mass. 545, 89 N. E. 166 (1909); Lackland *v.* Walker, 151 Mo. 210, 52 S. W. 414 (1899); St. James's Church *v.* Wilson, 82 N. J. Eq. 546, 89 Atl. 519 (1913); McIntire *v.* Zanesville, 17 Ohio, 352 (1848); Avery *v.* Home for Orphans, 228 Pa. 58, 77 Atl. 241 (1910); Brown *v.* Meeting Street Baptist Soc., 9 R. I. 177 (1869). In the following *cy-près* application was not allowed on account of expediency: *Re* Weir Hospital, *supra;* Harvard College *v.* Attorney-General, *supra.* And in the following the trust was held to fail for lack of a general charitable intent: *Re* Parker, [1918] 1 Ch. 437; *Re* Wilson, [1913] 1 Ch. 314; Bowden *v.* Brown, 200 Mass. 269, 86 N. E. 351 (1908); Teel *v.* Bishop of Derry, 168 Mass. 341, 47 N. E. 422 (1897); Morristown Trust Co. *v.* Morristown, 82 N. J. Eq. 521, 91 Atl. 736 (1913). If the original gift is to take effect only on a condition precedent, which is not performed, the bequest fails wholly. *Re* University of London Medical Funds, [1909] 2 Ch. 1; Cherry *v.* Mott, 1 Mylne & C. 123 (1835).

[25] Nourse *v.* Merriam, 8 Cush. (Mass.) 11 (1851).

[26] Brown *v.* Burdett, 21 Ch. Div. 667 (1882). See also 65 U. P. LAW REV. 527, 632.

[27] An interesting analogy tending to uphold a more liberal use of *cy-près* is found in the fact that equity does not enforce a restrictive covenant if circumstances have so changed from the time the covenant was made that its enforcement would injure both the dominant and servient tenements. Sayers *v.* Collyer, 28 Ch. Div. 103 (1884); Jackson *v.* Stevenson, 156 Mass. 496, 31 N. E. 691 (1892).

[1] WILLISTON'S WALD'S POLLOCK ON CONTRACTS, 342, 343.

[2] In Hunt *v.* Silk, 5 East 449 (1804), where the plaintiff was not allowed to rescind for the lessor's failure to repair, Lord Ellenborough said, "if the plaintiff might occupy the premises two days beyond the time . . . and yet rescind the contract, why might he not rescind it after a twelvemonth on the same account." Beed *v.* Blandford, 2 Y. & J. 278 (1828).

[3] Ankeny *v.* Clark, 148 U. S. 345 (1893); Campbell Printing Press Co. *v.* Marsh, 20 Colo. 22, 36 Pac. 799 (1894). See note 6, *post.*

benefit, however brief his retention of the goods. This rigid application of the rule is one reason why rescission of an executed sale for breach of warranty is not allowed in England,[4] the purchaser being restricted solely to his action for damages.[5] In the United States, however, such temporary ownership and use of the property as is necessary to discover the defect is not considered a sufficient benefit to prevent rescission, and a majority of the states now permit this remedy for breach of warranty.[6] The American law on this point seems to reach the more just result. Such a brief retention of the property seldom confers any actual benefit upon the purchaser, while to compel him to keep defective goods and allow him a recovery only in damages causes real hardship. All jurisdictions allow rescission of an executed sale induced by fraud.[7] But whether the seller acted in good faith or bad faith, the purchaser is equally injured by the seller's breach.[8] In view of this hardship upon the purchaser the English courts have sometimes gone to considerable lengths in order to allow rescission in effect by finding that the title never passed.[9]

But a real difficulty arises where the buyer has retained title to the goods for a substantial period of time and has received a substantial benefit before a latent defect could reasonably have been discovered. Even though the buyer has received some benefit, to forbid rescission would still cause considerable hardship. But in this case there is a new factor to be considered. Ordinarily the seller suffers no injustice by rescission, but under these circumstances there is an obvious hardship in requiring him to take back the property without any compensation for its use by the purchaser. Courts following the English doctrine would of course restrict the purchaser to his action for damages,[10] while the American courts, even in this case, would probably allow the buyer to rescind and recover the whole purchase price.[11] Neither result accords with principles of justice. A recent Canadian case illustrates a more just solution of the difficulty — a compromise between these two opposite extremes. In *Cushman Motor Works, Ltd.* v. *Laing* [12] the company sold to the defendant what purported to be a twenty-five horse-power thresh-

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[4] Street *v.* Blay, 2 B. & Ad. 456 (1831). See SALES OF GOODS ACT, 56 & 57 Vict., Chap. 71, § 11 (1). See also 15 HARV. L. REV. 148. In the case of a warranty a further ground for refusing rescission in England is that the warranty is said to be collateral to the principal contract. But the English law attempts to distinguish a condition from a warranty and, if the title has not passed, allow the purchaser to reject the goods for a breach of the former. "The essential thing . . . is whether the contract is executed or executory." See Samuel Williston, "Rescission for Breach of Warranty," 16 HARV. L. REV. 465.

[5] See note 4, *supra*.

[6] Edson *v.* Mancebo, 173 Pac. (Cal.) 484 (1918); Roper *v.* Wells, 182 Iowa 237, 165 N. W. 385 (1917); Wilson *v.* Solberg, 145 Wis. 573, 130 N. W. 472 (1911). For other cases on this point, see WILLISTON ON SALES, § 608, note 90. See UNIFORM SALES ACT, § 69 (1), (d).

[7] See WILLISTON ON SALES, § 608, 647. See MECHEM ON SALES, § 932.

[8] "A breach of warranty may be equally injurious to the buyer whether the vendor acted in good faith or bad faith." Milliken *v.* Skillings, 89 Me. 180, 36 Atl. 77 (1896).

[9] Varley *v.* Whipp, [1900] 1 Q. B. 513.

[10] See note 5, *supra*.

[11] See note 6, *supra*. In Roper *v.* Wells, *supra*, the purchaser was allowed to return the goods after three years' use without paying any part of the purchase price.

[12] 49 D. L. R. 1 (1919).

ing engine, which after two years' usage was discovered to have an actual capacity of only twenty-two horse-power. Upon suit by the plaintiff to recover the unpaid installments of the purchase price the defendant claimed the right to reject the engine and to recover the installments already paid. It was held that the defendant could recover the payments he had made, less $204, upon return of the engine to the seller. It was evident that the variation in horse-power could not reasonably have been discovered before. But to avoid the harsh operation of the English rule the court was forced to strain the facts in order to find that the representation was a condition of the sale and that title had never passed. However, on the findings the decision reaches a just result. The interesting feature of the case is that the seller was allowed to retain part of the purchase price. Curiously, however, the Canadian court did not state the basis upon which this deduction was estimated. One possible measure of the deduction might be the deterioration in value of the engine, but there seems to be no authority for this basis of calculation.[13] Probably the deduction was the estimated value of the benefit conferred upon the purchaser — a value based upon the principles of quasi-contract for unjust enrichment. This seems to be a more logical basis, and there is some authority to support such a deduction.[14] The adoption of the solution offered by the Canadian court would afford a practical and just rule for every case of breach of warranty — the buyer should be allowed to rescind on condition that he compensate the seller for any actual benefit received. In England, if this rule were applied, an attempt to value the purchaser's title for a day would prove the futility of offering such a benefit as a bar to rescission. The adoption in the United States of this solution would remove any possibility of hardship upon the seller.

RECENT CASES

AGENCY — AGENT'S LIABILITY TO THIRD PERSONS — WRITTEN CONTRACT FOR UNDISCLOSED PRINCIPAL. — An action was brought against the agent for failure to deliver goods under a written contract in which he described himself as "manufacturers' selling agent" and signed his own name. No other evidence having been offered, the lower court dismissed the complaint. *Held*, that a new trial be granted. *Levy* v. *Shour*, 178 N. Y. Supp. 227.

For a discussion of the principles involved in this case, see NOTES, p. 591, *supra*.

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[13] In Rice *v.* Butler, 160 N. Y. 578, 55 N. E. 275 (1899), the court calculated the deduction either as the value of the benefit received by the purchaser or as the amount of the deterioration in the property.

[14] Todd *v.* Leach, 100 Ga. 227, 28 S. E. 43 (1897); Wilson *v.* Burks, 71 Ga. 862 (1883); Baston *v.* Clifford, 68 Ill. 67 (1873); Syck *v.* Hellier, 140 Ky. 388, 131 S. W. 30 (1910); Vanatter *v.* Marquardt, 134 Mich. 99, 95 N. W. 977 (1903); Todd *v.* McLaughlin, 125 Mich. 268, 84 N. W. 146 (1900); Johnson *v.* Northwestern Mutual Life Ins. Co., 56 Minn. 365, 59 N. W. 992 (1894); Kicks *v.* State Bank of Lisbon, 12 N. D. 576, 98 N. W. 408 (1904); Hall *v.* Butterfield, 59 N. H. 354 (1879); Rice *v.* Butler, *supra*; Mason *v.* Lawing, 10 Lea. (Tenn.) 264 (1882). See KEENER ON QUASI-CONTRACTS, 305, 306. See WOODWARD ON QUASI-CONTRACTS, § 266. See WILLISTON'S WALD'S POLLOCK ON CONTRACTS, 343, 344. See Samuel Williston, "Repudiation of Contracts," 14 HARV. L. REV. 326–328. See 13 HARV. L. REV. 410.

ATTORNEYS — RELATION BETWEEN ATTORNEY AND CLIENT — LIABILITY FOR FAILURE TO BRING SUIT WITHIN PERIOD OF LIMITATIONS. — The plaintiff engaged the defendants, a firm of solicitors, to bring an action upon a claim. The obligor offered to settle, and the defendants transmitted the offer to the plaintiff. The latter delayed so long in answering that the defendants thought the offer was accepted. As a result, when suit was finally brought, the period of the Statute of Limitations (six months) had expired, and although the plaintiff contended that the obligor was estopped from setting up the statute, the judgment was against him. He then instituted this action for negligence in the performance of professional duties. The trial court found for the defendants. *Held*, that judgment be entered for the plaintiff. *Fletcher* v. *Jubb, Booth, & Hollwell*, 54 L. J. 411.

An attorney can be held to no higher standard than that of due care in the performance of legal work intrusted to him. *Godefroy* v. *Dalton*, 6 Bing. 460; *Malone* v. *Gerth*, 100 Wis. 166, 75 N. W. 972. But if he falls below that standard he is liable to the client for all damages proximately resulting therefrom to the latter. *Hart* v. *Frame*, 6 C. & F. 193; *Forrow* v. *Arnold*, 22 R. I. 305, 47 Atl. 693. Delay in the institution of proceedings, resulting in the barring of the action by the Statute of Limitations, has been held to be actionable negligence. *Hunter* v. *Caldwell*, 12 Jur. 285; *Oldham* v. *Sparks*, 28 Tex. 425. However, what constitutes negligence is a question to be decided, within the bounds of reason, by the trier of the facts. *Hunter* v. *Caldwell*, *supra; Pennington* v. *Yell*, 11 Ark. 212. Accordingly, it would seem that, in view of the complexity of the circumstances, the decision of the trial court should have been permitted to stand. Furthermore, in the trial against the obligor, the issue as to the Statute of Limitations involved a point of some nicety; and an attorney is not liable for an erroneous judgment on a reasonably doubtful legal question. *Kemp* v. *Burt*, 1 N. & M. 262; *Citizens' Loan Ass'n.* v. *Friedley*, 123 Ind. 143, 23 N. E. 1075.

CARRIERS — DUTY TO TRANSPORT AND DELIVER — APPROPRIATION BY CARRIER OF COMMERCIAL SHIPMENT OF COAL TO ITS OWN CONTRACT WITH THE CONSIGNOR. — A coal company, as consignor, in pursuance to its contract with the plaintiff, put coal on the defendant railroad's cars tagged to the plaintiff as consignee. The defendant had previously notified the coal company of its intention to refuse to accept the coal for shipment and to appropriate the coal to its own use under a previous contract between it and the company on which the latter was delinquent. The defendant carried out this intention and the plaintiff brought this action for the conversion of the coal. *Held*, that the defendant is not liable. *Springfield Light, Heat & Power Co.* v. *Norfolk & W. Ry. Co.* 260 Fed. 254 (Dist. Ct. S. D. Ohio).

The usual rule is that delivery by the shipper to the carrier vests title in the consignee. *Cox* v. *Andersen*, 194 Mass. 136, 80 N. E. 236; *Glauber Mfg. Co.* v. *Voter*, 70 N. H. 332, 47 Atl. 612. But this rule presupposes that the delivery is complete and with the consent of the carrier. *Sears, Roebuck & Co.* v. *Martin*, 145 Ala. 663, 39 So. 722; *Ward* v. *Taylor*, 56 Ill. 494. The principal case, then, might possibly be supported on the ground that the plaintiff was not the owner of the coal at the time of the alleged conversion and, therefore, not the proper party to sue; although an earlier case seems to indicate the contrary. See *Luhrig Coal Co.* v. *Jones & Adams Co.*, 141 Fed. 617, 624. The court, however, went further, and asserted a right of self-help by the carriers in cases of necessity to secure the performance of contractual obligations. It has been held that there is no right in a bailee in possession of another's property to appropriate it to an executory contract with the latter. *Atlantic Building Supply Co.* v. *Vulcanite Portland Cement Co.*, 203 N. Y. 133, 96 N. E. 370; *Newcomb-Buchanan Co.* v. *Baskett*, 4 Ky. L. Rep. 828. And a public service

company cannot refuse service solely because of past debts due it from the consumer. *Danaher* v. *Southwestern Telegraph Co.*, 94 Ark. 533, 127 S.W. 963; *Crumley* v. *Watauga Water Co.*, 99 Tenn. 420, 41 S. W. 1058; *State ex rel. Atwater* v. *Delaware L. & W. R. Co.*, 48 N. J. L. 55, 2 Atl. 803. If a carrier enjoys any rights of priority, it is only to the use of its own facilities for its own indispensable needs as a carrier. *Louisville & Nashville R. Co.* v. *Queen City Coal Co.*, 13 Ky. L. Rep. 832. See *Royal Coal & Coke Co.* v. *Southern Ry. Co.*, 13 Interst. Com. Comm. R. 440. In the instant case the carrier had no contract right to the specific coal and therefore could not get specific performance as to *this* coal even in equity. The virtual recognition by the court of a right of *angary* in public utilities, it is submitted, is without precedent and should not be followed. Its implications involve all the dangers of self-help. Even the power of eminent domain is no defense to a taking of property by self-help, which is certainly not due process. *City of Clinton* v. *Franklin*, 119 Ky. 143, 83 S. W. 140.

CARRIERS — DUTY TO TRANSPORT AND DELIVER — REFUSAL TO DELIVER WITHOUT PRODUCTION OF A LOST ORDER BILL OF LADING. — An interstate shipment of perishable goods was routed over connecting carriers, the initial carrier giving a through bill of lading to the shipper's order, notify a third party. The bill of lading was lost or delayed, and upon the arrival of the goods, the shipper's agent requested delivery. The terminal carrier refused to deliver without production of the bill of lading or a bond of indemnity. The initial carrier did not require a bond, and wired the terminal carrier to deliver. Several days elapsed after the receipt of this telegram before the terminal carrier made delivery, and in this period the goods were injured by frost. Suit was brought by the shipper against the initial carrier. The Carmack Amendment to the Interstate Commerce Act subjects the initial carrier to liability for "loss, damage or injury" caused goods by the default of a connecting carrier (34 U. S. STAT. AT L. 595, c. 3591, § 7). *Held*, that the shipper may recover. *McCotter* v. *Norfolk So. R. Co.*, 100 S. E. 326 (N. C.).

A carrier in delivering goods without requiring the production of an order bill of lading, does so at its peril, and in case of misdelivery is liable for a conversion to the person entitled to receive the goods. *Forbes* v. *Boston & Albany R. Co.*, 133 Mass. 154; *Ratzer* v. *Burlington, etc. R. Co.*, 64 Minn. 245, 66 N. W. 988. The same is true though the bill of lading contains a direction to notify a third person. *No. Pa. R. Co.* v. *Commercial Bank*, 123 U. S. 727; *Atlanta Nat. Bank* v. *So. R. Co.*, 106 Fed. 623; *Union Stock Yards Co.* v. *Westcott*, 47 Neb. 300, 66 N. W. 419. Accordingly, the carrier may, for its own protection, make the production of the bill of lading a condition to delivery. *Kaufman* v. *Seaboard Air Line R.*, 10 Ga. App. 248, 73 S. E. 592. That the consignor, to whose order the bill was taken, requests a delivery, should not alter the situation. See *Schlichting* v. *Chicago, etc. R. Co.*, 121 Ia. 502, 96 N. W. 959. If the goods are perishable, and the bill of lading has been lost or delayed, the law should not allow an *impasse*. It would seem proper to require that the carrier deliver in such case without receiving the bill of lading, if he is properly indemnified against possible loss by the party requesting delivery. In the principal case recovery was allowed as for a default of the terminal carrier. But as it does not appear that it was offered indemnity, or that it assented to deliver without such protection before the delivery was actually made, it seems questionable whether a breach of duty on the part of the terminal carrier has been made out. It is possible, however, that the initial carrier was itself in default in failing to take and offer to the terminal carrier the indemnity offered by the shipper.

CARRIERS — REGULATION OF RATES — GOOD FAITH IN RECEIVING A REBATE AS A DEFENSE TO THE SHIPPER UNDER THE ELKINS ACT. — The de-

fendant below, a shipper, was indicted, convicted, and fined for accepting rebates and concessions from the Central R. R. of New Jersey in violation of the Elkins Act as amended in 1906 (38 STAT. AT L. 584). The defendant had leased its own road to the railroad company in 1871, the lessee covenanting that all coal shipped from the lessor's mines should be transported at a rate from a certain point, about 14 per cent less than other shippers paid. After the passage of the Elkins Act, with each tariff filed was a footnote reciting that "in compliance with the tenth Covenant of the lease from the Lehigh Coal and Navigation Company . . . a lateral allowance is made out of the herein named rates to the Lehigh Coal and Navigation Company." The shipper offered evidence that he received this allowance, believing that this complied with the law. The court below rejected this evidence of good faith, but certified the question to the Supreme Court. *Held*, that the evidence should have been received. *Lehigh Coal & Navigation Co.* v. *United States*, U. S. Sup. Ct., October Term, 1919, No. 38.

The essential idea of the Interstate Commerce Acts is that the filed and published rates shall be a definite standard for all. See *New Haven R. R.* v. *I. C. C.*, 200 U. S. 361, 391, 398; *Lehigh Valley R. R.* v. *United States*, 243 U. S. 444, 446. Any device whereby one shipper's goods are carried for a lower rate, directly or indirectly, is prohibited. *United States* v. *Union Stockyards Transit Co.*, 226 U. S. 286; *Armour Packing Co.* v. *United States*, 209 U. S. 56. Discrimination is unnecessary. *Vandalia R. R.* v. *United States*, 226 Fed. 713. All prior contracts whereby special rates or favors were given are abrogated by the Act. *Louisville & Nashville R. R.* v. *Mottley*, 219 U. S. 467; *Armour Packing Co.* v. *United States*, *supra*. Good faith in the sense of absence of an intent to violate the statute is immaterial. *C. St. P. M. & O. Ry.* v. *United States*, 162 Fed. 835, *certiorari* denied, 212 U. S. 579; *Armour Packing Co.* v. *United States*, *supra*. But see *Standard Oil Co. of Indiana* v. *United States*, 164 Fed. 376. The court in the principal case apparently assumes and correctly so, that the filing of this clause of the lease did not satisfy the statute. See *Armour Packing Co.* v. *United States*, 209 U. S. 56, 81. *Cf. Boston & Maine R. R.* v. *Hooker*, 233 U. S. 97. It is difficult to regard good faith in believing that one has complied with the statute as of greater weight than good faith in the sense of absence of intent to evade the statute. The carrier involved in the principal case was indicted and convicted on the same facts and a writ of *certiorari* was denied by the Supreme Court. *Central R. R. of New Jersey* v. *United States*, 229 Fed. 501, *certiorari* denied, 241 U. S. 658. Although the cases are distinguishable on the point of procedure, the Act would seem to place carrier and shipper on the same footing, and what is a crime for one should be a crime for the other unless we adopt the too common theory that a railroad is *a fortiori* a criminal.

CHARITABLE USES AND TRUSTS — *CY-PRÈS* — WHETHER BETTER SATISFACTION OF ARTISTIC SENSE JUSTIFIES A CHANGE. — A church was the trustee of a fund that had been collected to procure and erect a statue of an ecclesiastic near the church. After the statue had been erected, the church sought permission to substitute another statue of the same ecclesiastic, purchased by authority of the court from the surplus funds on the ground that the latter was artistically the superior. *Held*, that the change cannot be allowed. *Eliot* v. *Attwill*, 122 N. E. 648 (Mass.).

For a discussion of this case, see NOTES, p. 598, *supra*.

CONSTITUTIONAL LAW — POWERS OF LEGISLATURE: DELEGATION OF POWERS — INITIATIVE AND REFERENDUM IN CANADA. — The legislative assembly of Manitoba passed an act providing that laws might be made and repealed by direct vote of the electors. (6 GEO. V, c. 59, Manitoba.) The act

detracted from the powers of the Lieutenant-Governor as given by the British North America Act (30 VICT., c. 3, §§ 54, 56, 90). Provision is made by § 92 (1) of the latter act: "In each Province, the Legislature may exclusively make laws in relation to . . . the amendment, from time to time . . . of the Constitution of the Province, except as regards the office of Lieutenant-Governor." *Held*, that the Manitoba act is *ultra vires*. *In re the Initiative and Referendum Act*, [1919] A. C. 935 (Privy Council).

In the United States, it would seem that provision for the initiative and referendum may not be made by state statute, due to the constitutional principle that legislative power is delegated by the people to a definite legislative body, which cannot in turn pass its powers on. *Ex parte Wall*, 48 Cal. 279, 315; *C. W. & Z. R. R.* v. *Clinton County*, 1 Ohio St., 77, 87. See 16 HARV. L. REV. 218. Such legislative device may be secured, however, through constitutional provision or amendment, and does not contravene the Federal Constitution, which guarantees to the states a republican form of government. *Kadderly* v. *Portland*, 44 Ore. 118, 74 Pac. 710; *State* v. *Hutchinson*, 93 Kan. 405, 144 Pac. 241. See 24 HARV. L. REV. 141. In Canada the British North America Act constitutes the fundamental law, and is the charter by which the rights of the dominion and provincial governments are to be determined. *Mercer* v. *Attorney-General*, 5 Can. S. C. 538, 675. Within the limits prescribed by § 92 of that act, the provincial legislatures are deemed to have plenary authority — are not considered mere delegates of the Imperial Parliament. See LEFROY, CANADA'S FEDERAL SYSTEM, 64. Accordingly, they may seek the assistance of subordinate agencies for the enactment of local regulations, such as the licensing and control of taverns. *Hodge* v. *The Queen*, L. R. 9 A. C. 117, 132. And they may legislate conditionally; for example, by prescribing that an act shall come into operation only on the petition of a majority of electors. *Russell* v. *The Queen*, L. R. 7 A. C. 829, 835. It has also been suggested that, not being themselves delegates, they may endow a new and different legislative body with their powers. See LEFROY, CONSTITUTIONAL LAW OF CANADA, 69; CANADA'S FEDERAL SYSTEM, 65, 69. This problem was adverted to in the principal case, but no opinion was expressed; the court considering that the case was concluded on the short ground that the provincial legislature had, in taking from the powers of the Lieutenant-Governor, exceeded an express limitation.

CONSTITUTIONAL LAW — POWERS OF LEGISLATURE: THE WAR POWER — WAR-TIME PROHIBITION. — On November 21, 1918, after the armistice with Germany had been signed, the War-Time Prohibition Act was approved, the act providing that after June 30, 1918, until the conclusion of the war and the termination of demobilization, the date to be proclaimed by the President, it should be unlawful to sell for beverage purposes any distilled spirits. Injunctions were asked against internal revenue collectors to restrain them from taking steps under the act. *Held*, that the act is constitutional. *Hamilton* v. *Kentucky Distilleries and Warehouse Co.; Dryfoos et al.* v. *Edwards*, U. S. Sup. Ct., Nos. 589 and 602, October Term, 1919.

On October 28, 1919, the Volstead Act was passed over the President's veto, providing that the words "beer, wine, or other intoxicating malt or vinous liquors" in the War-Time Prohibition Act should be construed to mean any liquors which contain in excess of one half of one per cent alcohol. Suit was brought to restrain the enforcement of the act. *Held*, that the act is constitutional. McReynolds, Day, Van Devanter, and Clarke, JJ., dissenting. *Ruppert* v. *Caffey*, U. S. Sup. Ct., No. 603, October Term, 1919.

For a discussion of these cases, see NOTES, p. 585, *supra*.

CONTRACTS — CONSTRUCTION — DURATION OF A CONTRACT IN THE ABSENCE OF A SPECIFIED TIME LIMIT. — The plaintiff, a liquor dealer, in sub-

scribing to stock in the defendant company contracted also to purchase from defendant "10 barrels of beer per week aggregating 520 barrels per year." No time was expressed limiting the duration of this contract. The plaintiff complied with it for three years and then refused to take any more beer, although he remained in the liquor business for four years thereafter. In a suit by the plaintiff for unpaid dividends on his stock the defendant claimed by way of set-off the damages resulting from the plaintiff's alleged breach of contract. *Held*, that the defendant recover. *Nolle* v. *Mutual Union Brewing Co.*, 108 Atl. 23 (Pa.).

Often the duration of a contract, though not specified, is implied in fact. *Pfiester* v. *Western Union Tel. Co.*, 282 Ill. 69, 118 N. E. 407. But how construe a contract wherein the parties neither expressly nor by implication of fact indicate their intent concerning its duration? It has been held that such contracts are terminable at will. *Barney* v. *Indiana Ry. Co.*, 157 Ind. 228, 61 N. E. 194; *Victoria Limestone Co.* v. *Hinton*, 156 Ky. 674, 161 S. W. 1109. This construction makes the mutual promises illusory and denies the existence of a bilateral contract, which is contrary to the business intent of parties entering into a bargain. The law, moreover, favors a construction of validity where not incompatible with the language of the contract. See *Hobbs* v. *McLean*, 117 U. S. 567, 576. We find also authority for the proposition that such contracts are presumptively of perpetual duration. *McKell* v. *Chesapeake R. Co.*, 175 Fed. 321. See *Western Union Tel. Co.* v. *Penna. Co.*, 129 Fed. 849, 861. In the vast majority of cases, however, perpetual obligation is not contemplated by the parties. A construction, moreover, imposing such obligation should, where possible, be avoided. *Texas & Pac. Ry. Co.* v. *City of Marshall*, 136 U. S. 393; *Maccalum Printing Co.* v. *Graphite Compendius Co.*, 150 Mo. App. 383, 130 S. W. 836. A third construction taken makes such contracts terminable by either party upon reasonable notice. *Stonega Coke & Coal Co.* v. *L. & N. Ry. Co.*, 106 Va. 223, 55 S. E. 551; *Dunham* v. *Orange Lumber Co.*, 59 Tex. Civ. App. 268, 125 S. W. 89. While this view probably accords with custom in contracts of employment, it is doubtful whether in contracts involving subject matter of a different type "terminable upon reasonable notice" is much better than "terminable at will." It is suggested that these contracts should be construed to extend over a reasonable period of time, considering the subject matter of the agreement and the situation of the parties at the time it was made. The principal case, while purporting to imply in fact a limit of time from the surrounding circumstances, is in effect adopting the last construction. *Cf. Suburban R. T. St. Ry. Co.* v. *Monongahela Natural Gas Co.*, 230 Pa. 109, 79 Atl. 252.

CRIMINAL LAW — SELF-DEFENSE — BURDEN OF PROOF. — Under a plea of not guilty to an indictment charging murder, the defendant admitted killing the deceased but claimed self-defense as a justification. *Held*, that the burden of establishing self-defense by a preponderance of evidence was upon the accused. *State* v. *Mellow*, 107 Atl. 871 (R. I.).

It is a general principle of criminal law that the burden of proving the guilt of a defendant beyond a reasonable doubt is always upon the prosecution. The absence of affirmative pleadings in criminal actions and the policy of the law to use the utmost precaution to prevent injustice to the accused seem to be the reasons for this doctrine. See 4 WIGMORE, EVIDENCE, § 2512. When self-defense is the justification offered under a plea of not guilty to a charge of murder, the great weight of authority follows the above rule. *People* v. *Downs*, 123 N. Y. 558, 25 N. E. 988; *Gravely* v. *State*, 38 Neb. 871, 57 N. W. 751. On the other hand, a few courts go to the other extreme by holding that self-defense must be established by the defendant to the satisfaction of the jury. *State* v. *Byers*, 100 N. C. 512, 6 S. E. 420; *State* v. *Honey*, 65 Atl. 764. (Del.)

Such a rule clearly imposes too great a burden, even though it generally has been limited to cases where the killing was caused by a deadly weapon. But the advisability of adhering to the rule followed by the majority of courts seems questionable in an age when punishment for crime has lost its barbarous character and when unnecessary technicalities are being dispensed with to promote justice. Consequently, an increasing number of jurisdictions have adopted the doctrine of the principal case, that self-defense must be proved by the accused by a preponderance of the evidence. *State* v. *Dillard*, 59 W. Va. 197, 53 S. E. 117; *Szalkai* v. *State*, 96 Ohio St. 36, 117 N. E. 12. Since justification by way of self-defense admits the criminal act, such a rule places no unreasonable burden upon the accused. See 17 HARV. L. REV. 208.

DAMAGES — BREACH OF WARRANTY — DUTY OF BUYER TO MITIGATE CONSEQUENTIAL DAMAGES. — The plaintiff sold to the defendant a refrigerator. In an action for the balance of the purchase price the defendant counterclaimed for losses due to the failure of the refrigerator to fulfill the purpose for which it was bought and introduced evidence that he had lost thereby a large quantity of flowers. A verdict was rendered in favor of the defendant for affirmative damages. *Held*, that the evidence supported this verdict. *Buchbinder Bros.* v. *Valker*, 173 N. W. 947 (N. D.).

For breach of warranty a vendee is permitted to recover consequential damages resulting from the defect, in addition to the difference between the actual and the represented value of the goods. *Black* v. *Elliott*, 1 F. & F. 595; *French* v. *Vining*, 102 Mass. 132; *New York Mining Co.* v. *Fraser*, 130 U. S. 611. See WILLISTON ON SALES, § 614. The courts, indeed, have gone very far in cases of warranties in considering such indirect consequences as recoverable. See 33 HARV. L. REV. 475. But it is a general principle of the law of damages that the injured party cannot recover for losses which he could have avoided by the use of reasonable care. *Texas & Pacific Ry. Co.* v. *White*, 101 Fed. 928; *Gordon* v. *Brewster*, 7 Wis. 355. This principle applies to damages for breach of warranty. *Razey* v. *J. B. Colt Co.*, 106 N. Y. App. Div. 103, 94 N. Y. Supp. 59; *Mark* v. *Williams Cooperage Co.*, 204 Mo. 242, 103 S. W. 20. In the principal case the jury allowed a recovery for the loss of flowers repeatedly placed in the defective refrigerator furnished by the vendor. The minority of the court contended that evidence of these losses should not have been admitted. But it is for the jury to decide whether any of the damages claimed could have been avoided with due care. *Tatro* v. *Brower*, 118 Mich. 615, 77 N. W. 274; *Ford* v. *Illinois Refrigerating Construction Co.*, 40 Ill. App. 222. On this ground the case can be supported.

EQUITY — DAMAGES — AWARD OF SEPARATE DAMAGES TO EACH OF SEVERAL PLAINTIFFS IN ADDITION TO AN INJUNCTION. — The defendant's factory constituted a nuisance to neighboring landowners who joined in a bill in equity asking for an injunction and damages for the injuries suffered by each. The Georgia Code provides that where there is one common right to be established by several persons against another, they may join in the same suit against him. (GA. CIVIL CODE, § 5419.) A demurrer on the ground of misjoinder of parties and causes of action was interposed by the defendant. *Held*, that the demurrer be overruled. *Knox* v. *Reese*, 100 S. E. 371 (Ga.).

That equity has jurisdiction to enjoin a permanent or continuing nuisance is clear. *Wood* v. *Conway Corporation*, [1914] 2 Ch. 47; *Nixon* v. *Bolling*, 145 Ala. 277, 40 So. 210. Where several landowners are injured by the same nuisance, equity permits them, for the purpose of avoiding a multiplicity of suits, to join in a single bill for an injunction. *Cadigan* v. *Brown*, 120 Mass. 493; *Murray* v. *Hay*, 1 Barb. Ch. (N. Y.) 59. *Contra*, *Fogg* v. *Nevada C. O. Ry. Co.*, 20 Nev. 429, 23 Pac. 840. See 1 POMEROY, EQ. JUR., 4 ed., § 257. It is axiomatic that

once having acquired jurisdiction for any purpose, equity may proceed and give complete relief; and accordingly, where a plaintiff establishes his right to a permanent injunction, he may also have damages for past injury. *Keppel* v. *Lehigh Coal, etc. Co.*, 200 Pa. 649, 50 Atl. 302. See 1 AMES, CASES, EQUITY, 571, note; 1 POMEROY, EQ. JUR., 4 ed., § 237. If damages had been the only remedy sought by the several plaintiffs, the jurisdiction of equity having been invoked solely to avoid a multiplicity of suits, it could be said, with some show of reason, that there was a misjoinder of causes of action, — that each action should be tried separately at law. *Ducktown Sulphur, etc. Co.* v. *Fain*, 109 Tenn. 56, 70 S. W. 813; *Tribette* v. *Ill. Cent. R. Co.*, 70 Miss. 182, 12 So. 32; *Roanoke Guano Co.* v. *Saunders*, 173 Ala. 347, 56 So. 198. But *cf. Guess* v. *Stone, etc. Ry. Co.*, 67 Ga. 215. But where several plaintiffs are permitted to join in a bill for an injunction, there seems to be no reason why equity should not award separate damages to each, as was done in the principal case. However, owing to the former hostility of the common-law courts, equity has, in such a situation, been reluctant to give the characteristically legal remedy of money damages even by way of complete relief. *Murray* v. *Hay, supra; City of Paducah* v. *Allen*, 49 S. W. (Ky.) 343. See *Grant* v. *Schmidt*, 22 Minn. 1, 3. The tendency represented by the principal case is a wholesome one.

HOMICIDE — INTENT — INTENT TO KILL NOT COINCIDENT WITH KILLING. — The accused struck his wife with a plowshare. Under a reasonable belief that she was dead, the accused then hung her to a beam, so that it might be thought she had committed suicide. In fact, it was the hanging and not the blow that caused death. *Held*, that the accused is not guilty of murder under the Indian Penal Code. *In re Palani Goundan*, 26 Madras L. T. R. 68.

At common law it is clear that the hanging, of itself, would not make the accused guilty of murder because of the lack of a guilty mind, since the intent of an accused must depend on the facts as he reasonably conceived them. *Shorter* v. *People*, 2 Comst. (N. Y.) 193; *Reg.* v. *Rose*, 15 Cox. c. c. 540. And obviously the blow with the plowshare, of itself, would not make him guilty even of manslaughter, because it did not kill. But the hanging having been done to conceal the effects of the blow, the two may be regarded as so bound together that whatever intent the accused had at the time he struck the blow may be attributed to him at the time of the hanging. *Cf. Jackson* v. *Commonwealth*, 100 Ky. 239, 38 S. W. 422, 1091. Similarly, in other parts of the criminal law it is held that the intent outlives the technical completion of the offense. On such reasoning, if A and B commit a burglary in common, and during their escape A kills a man, B is guilty of murder. *Starks* v. *State*, 137 Ala. 9, 34 So. 687. Under this view of the principal case the defendant would, at common law, be guilty of either murder or manslaughter, according to the nature of the original assault. *Jackson* v. *Commonwealth*, 100 Ky. 239, 38 S. W. 422, 1091. But this theory is not wholly satisfactory, because it operates as a conclusive presumption that at the time of his second act the accused had a certain mental state, which it is quite possible he did not have in fact. It is suggested that the difficulty could be overcome by regarding the blow as the proximate cause of death, either on the ground that it directly caused the hanging, or that the hanging was done in an attempt to lessen the danger (to himself) caused by the blow. Both these theories are equally applicable under the Indian Code. See INDIAN PENAL CODE, § 299.

ILLEGAL CONTRACTS — CONTRACT AGAINST PUBLIC POLICY — MEMBER OF LEGISLATURE ACTING AS LAND AGENT BETWEEN VENDOR AND GOVERNMENT. — The defendant employed the plaintiff's agent, A, who was a member of the legislative assembly, to sell the defendant's land to the government. The legislative assembly had the power to advise the board and minister charged

with the purchase of the land and finally to review their decision. The plaintiff sues on the contract for commission for the services rendered by him, through A, to the defendant in the sale of the land. *Held*, that the contract is unenforceable. *Horne* v. *Barber*, [1919] V. L. R. 553.

In determining whether a contract is against public policy, its tendency, and not simply the actual result, must be considered. *McMullen* v. *Hoffman*, 174 U. S. 639; *Sherman* v. *Burton*, 165 Mich. 293, 130 N. W. 667; *Egerton* v. *Brownlow*, 4 H. L. C. 1. Agreements between private individuals to influence official action by such methods as may substitute private interests in the place of the public welfare are illegal. *Hare* v. *Phaup*, 23 Okla. 575, 101 Pac. 1050; *Drake* v. *Lauer*, 93 N. Y. App. Div. 86, 86 N. Y. Supp. 986. The same is true of contracts to agitate popular action for individual motives. *Metz* v. *Woodward-Brown Realty Co.*, 182 N. Y. App. Div. 60, 169 N. Y. Supp. 299; *Stirtan* v. *Blethen*, 79 Wash. 10, 139 Pac. 618. By the better view, contracts for a contingent commission upon a sale to the government do not come within this principle because the corrupting tendency is too remote. *Kerr* v. *American Pneumatic Service Co.*, 188 Mass. 27, 73 N. E. 857. But public officers are barred from having a private interest in the contracts of the body which they represent. *Goodyear* v. *Brown*, 155 Pa. St. 514, 26 Atl. 665; *Brennan* v. *Purington Paving Brick Co.*, 171 Ill. App. 276. There can be no doubt that the instant case falls within the category of agreements tending to create a corrupting conflict between public duty and private interest and is therefore against public policy. *Cf. Oscanyan* v. *Winchester Repeating Arms Co.*, 103 U. S. 261; *Montefiore* v. *Menday Motor Components Co.*, [1918] 2 K. B. 241.

INSANE PERSONS — CONFLICTING ADJUDICATIONS AS TO COMPETENCY — CAPACITY TO SUE. — In an action for libel in a federal court in New York, the defendant set up a New York court's adjudication of the plaintiff's insanity to establish his incapacity to sue. The New York code provides that a party may prosecute or defend a civil action "unless he has been judicially declared to be incompetent to manage his affairs" (CODE CIV. PRO., § 55). The plaintiff proved a subsequent adjudication of sanity by a foreign court of competent jurisdiction. *Held*, that he was competent to sue. *Chaloner* v. *New York Evening Post Co.*, 260 Fed. 335 (Dist. Ct. S. D. N. Y.).

Since the competency of parties is a procedural question, the federal courts should generally follow local practice on this subject. See U. S. REV. STAT., § 914. Accordingly, the plaintiff could not have successfully maintained, in a federal court in New York, any action for the return of his property held by a New York commission, or for the commission's refusal to deliver it, which he could not have maintained in the state court. *Gasquet* v. *Fenner*, 247 U. S. 16; *Chaloner* v. *Sherman*, 242 U. S. 455. The foreign adjudication could have no extraterritorial effect on the plaintiff's right to property in the custody of the New York commission. *Gasquet* v. *Fenner*, *supra*. Here, however, the plaintiff simply offered the foreign adjudication to establish his competency, under the New York code, to appear in court as a party plaintiff. As the court said, the gist of the code disqualification is the mental incapacity, not the fact of a judicial declaration of insanity. An adjudication of lunacy is not conclusive as to subsequent mental capacity. *Lucas* v. *Parsons*, 23 Ga. 267. See BUSWELL, LAW OF INSANITY, §§ 194 *et seq.* Accordingly, in passing on the plaintiff's capacity to sue, controlling weight was correctly given to the most recent determination of that issue.

INTERNATIONAL LAW — WAR — COSTS AND DAMAGES REFUSED FOR A VIOLATION OF NEUTRALITY WHERE UNINTENTIONAL. — A British war vessel captured a German merchant ship inside Norwegian territorial waters. The British commander had miscalculated his position and had no intention to

violate Norwegian neutrality. In a suit to condemn the captured vessel the Norwegian government comes in as claimant. *Held*, that restitution will be decreed, but without damages or costs. *The Düsseldorf*, [1919] P. 245.

When a vessel is illegally captured on the high seas the owner is entitled to restitution with costs and damages. *The Glen*, Blatchf. Prize Cas. 375; *The Fortuna*, 2 Jur. (N. S.) 71. See *The Zamora*, [1916] 2 A. C. 77, 111. But costs and damages are not awarded where there was probable cause for the seizure. *The Sir William Peel*, 5 Wall. (U. S.) 517; *The City of Mexico*, 25 Fed. 924. However, there is no real analogy between the case of wrongful seizure on the high seas and that of the capture of a lawful prize in neutral waters. In the latter case the owners of the captured vessel have no claim against the capturing power; the sole controversy is between the sovereign whose neutrality has been violated and the power which has violated it. *The Lilla*, 2 Sprague, 177; *The Adela*, 6 Wall. (U. S.) 266; *The Bangor*, [1916] P. 181. See 7 MOORE, DIG. INT. L., § 1211. The neutral power is entitled to restitution of the vessel and, if the infringement of its neutrality was deliberate, to damages and costs. *The Anna*, 5 Rob. 373. See 7 MOORE, DIG. INT. L., § 1334. But where the infringement was not intentional, the little authority which exists holds, with the principal case, that damages will not be awarded. *The Twee Gebroeders*, 3 Rob. 162. See *The Vrow Anna Catharina*, 5 Rob. 15, 16. The reason for this is not clear. The common law does not excuse trespass because of mistake. *Mishler Lumber Co.* v. *Craig*, 112 Mo. App. 454, 87 S. W. 41; *Chase* v. *Clearfield Lumber Co.*, 209 Pa. St. 422, 58 Atl. 813. The rule is the same in the civil law and the Roman law. See GRUEBER, THE LEX AQUILIA, 222; 2 BAUDRY LACANTINERIE, PRÉCIS DE DROIT CIVIL, 948. There seems to be no valid reason for a different principle for international trespasses. But see 1 OPPENHEIM, INT. L., § 154; 2 *Id.*, § 359. And the civil law writers do not recognize the principle laid down here by the British Admiralty Court. See 1 HAUTEFEUILLE, DES DROITS ET DES DEVOIRS DES NATIONS NEUTRES, 294.

NUISANCE — WHAT CONSTITUTES NUISANCE — UNDERTAKING ESTABLISHMENT AND MORGUE IN RESIDENTIAL DISTRICT. — The defendants opened an undertaking establishment and morgue in a dwelling-house in a purely residential district. The plaintiffs, neighboring property owners, seek to enjoin the maintenance of the business, alleging it to be a nuisance. The Washington Code defines a nuisance as anything such "as to essentially interfere with the comfortable enjoyment of life and property." (1915 REM. CODE, § 943.) *Held*, that the injunction be granted. *Goodrich* v. *Starrett*, 184 Pac. 220 (Wash.).

An undertaking business is clearly not a nuisance *per se*. *Westcott* v. *Middleton*, 43 N. J. Eq. 478, 11 Atl. 490. See *Densmore* v. *Evergreen Camp*, 61 Wash. 230, 231, 112 Pac. 255. However, many establishments which are not nuisances *per se* have been held to be such when conducted in residential districts so as to interfere with the comfort, well-being, and property-rights of the inhabitants of the vicinity. *Barth* v. *Psychopathic Hospital*, 196 Mich. 642, 163 N. W. 62 (insane asylum); *Rodenhausen* v. *Craven*, 141 Pa. 546, 21 Atl. 774 (carpet-cleaning shop); *Whitney* v. *Bartholomew*, 21 Conn. 213 (carriage factory). The law will not take cognizance of slight discomforts and inconveniences. *Lane* v. *Concord*, 70 N. H. 485, 49 Atl. 687; *Rhodes* v. *Dunbar*, 57 Pa. 274. But if the annoyance is such as to make the adjoining property less habitable by persons of ordinary sensibilities — thus decreasing the value of the property — it will be considered a nuisance. *Lowe* v. *Prospect Hill Cemetery*, 58 Neb. 94, 78 N. W. 488; *Susquehanna Fertilizer Co.* v. *Malone*, 73 Md. 268, 20 Atl. 900. Accordingly, an undertaking establishment and morgue with the morose succession of funeral services, the hysteria of mourners, the dread of contagion, and the annoyance from escaping deodorants, may well be held a nuisance, if

located in a purely residential section of the community. *Saier* v. *Joy*, 198 Mich. 295, 164 N. W. 507; *Densmore* v. *Evergreen Camp*, *supra*. But in any case it is a question of applying the legal standard to the particular facts of a given situation — to attempt to lay down detailed rules as to what constitutes a nuisance is futile.

OFFER AND ACCEPTANCE — BILATERAL CONTRACTS — SILENCE AS ACCEPTANCE. — A traveling salesman of the defendant corporation solicited and obtained from the plaintiff an order for certain goods which he was authorized to handle. The plaintiff heard nothing more from the order until he directed shipment two months later under the terms of the order. The defendant denied any acceptance. In the meanwhile the price of the goods had advanced considerably. The plaintiff sued for breach of contract and obtained judgment in the lower court. *Held*, that the judgment be affirmed. *Cole-McIntyre-Norfleet Co.* v. *Holloway*, 214 S. W. 817 (Tenn.).

For a discussion of this case, see NOTES, *supra*, p. 595.

PLEADING — PARTIES — JOINDER — COUNTERCLAIM AGAINST THE PLAINTIFF AND ANOTHER IN THE ALTERNATIVE UNDER THE JUDICATURE ACT. — In an action for goods sold and delivered, the defendant pleaded as a defense and also by way of counterclaim that the plaintiff committed a breach of an implied term of the contract by failing to pack the goods in such a way as to make them reasonably fit to stand the ordinary risks of transit by rail. In the counterclaim he joined the carrier, alleging against it that the goods had been so treated in transit that on their arrival they were in bad condition. The Judicature Act of 1873 provides that the courts shall have power to grant to any defendant "all such relief relating to or connected with the original subject of the cause or matter, and in like manner claimed against any other person, whether already a party to the same cause or matter or not . . . as might properly have been granted against such person if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose" (36 & 37 VICT., c. 66, § 24 (3)). From an order refusing to strike out the counterclaim in so far as it joined the carrier as a defendant to the counterclaim, the plaintiff appealed. *Held*, that the order be affirmed. *Smith* v. *Buskell*, [1919] 2 K. B. 362.

Under the Judicature Act of 1873 and the Supreme Court of Judicature Rules, Order XVI, Rule 7, a plaintiff who is in doubt as to the person from whom he is entitled to redress may join two or more defendants in order to determine which, if any, of the defendants is liable. See 31 HARV. L. REV. 1034. The principal case is the converse of this proposition. A defendant who wishes to set up a counterclaim to a cause of action growing out of the same transaction as that which formed the basis of the plaintiff's cause of action, but who is in doubt as to whether the plaintiff or some third party connected with the transaction is liable, may join both as defendants to the counterclaim. See SUPREME COURT OF JUDICATURE RULES, Order XIX, Rule 3; Order XXI, Rules 11 and 15. The result is a logical development from the previous English decisions, and the case shows a willingness by the English Court effectively to carry out the purpose of procedural reform legislation; an attitude which has unfortunately not always been taken by the American courts.

PUBLIC SERVICE COMPANIES — FRANCHISES — PROTECTION OF PUBLIC SERVICE ENTERPRISES FROM COMPETITION. — A metropolitan street railway system had been established, under a general law providing that no two railroad corporations should occupy and use the same street or track for a greater distance than five blocks, and the franchise contained a similar provision. It sought an injunction to prevent the city from constructing a parallel system in

the same streets and on either side of its tracks as authorized by a subsequent statute and an amendment to the state constitution. *Held*, that the injunction be denied. *United Railroads of San Francisco* v. *City and County of San Francisco*, 249 U. S. 517.

For a discussion of the principles involved in this case see NOTES, p. 576, *supra*.

RESCISSION — FOR BREACH OF WARRANTY — DEDUCTION FOR BENEFITS RECEIVED. The plaintiff sold a twenty-five horse-power threshing engine to the defendant. In answer to the defendant's constant complaints that the engine was unsatisfactory, the plaintiff promised to make it work properly. After the defendant had used it for two years, the plaintiff sued for the balance of the purchase price. The defendant then discovered that the engine had a capacity of only twenty-two horse-power and claimed the right to reject the engine and recover the purchase installments already paid. The lower court found that the representation that the engine had a capacity of twenty-five horse-power was a condition of the sale and that its failure to develop twenty-five horse-power was the main cause of the engine's unsatisfactory performance. *Held*, that the defendant should recover the purchase installments less $204. *Cushman Motor Works, Ltd.* v. *Laing*, 49 D. L. R. 1 (Alberta).

For a discussion of this case, see NOTES, p. 602, *supra*.

STATUTES — INTERPRETATION — EFFECT OF PRIOR REPEALED STATUTES COVERING THE SAME SUBJECT. — The defendant was indicted under a statute making it unlawful to deal in liquors, which were defined as "all combinations . . . of drinks and drinkable liquids which are intoxicating; and any liquor which contains more than 2½% of proof spirits shall be conclusively deemed to be intoxicating." (1916 6 GEO. V, c. 112, § 20). On proof that the defendant had in his possession a patent medicine which contained more than 2½% of alcohol but which also contained drugs the effect of which would be to cause sickness before intoxication, he was convicted. *Held*, that the conviction be quashed. *Rex* v. *Dojacek*, 49 D. L. R. 36 (Manitoba).

In determining the uncertain meaning of the word "drinkable," the court looked at the words and policy of a prior repealed statute which provided for local option. See 1913 REV. STAT. MANITOBA, c. 117. Statutes *in pari materia*, though passed at different times and not referring to one another, are generally considered as one system of legislation and are construed as explanatory one of another. See *Rex* v. *Loxdale*, 1 Burr. 445, 447; *Goldsmiths Co.* v. *Wyatt*, 76 L. J. K. B. (N. S.) 166, 169. See also ENDLICH, INTERPRETATION OF STATUTES, § 43. This is done upon the assumption that the legislature is familiar with the earlier statutes and by use of similar words has intended to preserve similar meanings. See *Town of Benton* v. *Willis*, 76 Ark. 443, 446, 88 S. W. 1000, 1001; *Robbins* v. *Omnibus R. Co.* 32 Cal. 472, 474. Earlier acts may explain the meaning of later acts. *Patterson* v. *Winn*, 11 Wheat. 380; *Powers* v. *Shepard*, 48 N. Y. 540. And *vice versa*, later acts may explain earlier ones. *Clark* v. *Powell*, 4 B. & Ad. 846; *United States* v. *Freeman*, 3 How. 556. Even repealed or expired statutes should be taken into consideration as instructive steps in the development of the existing system of legislation upon a subject. *Ex parte Crow Dog*, 109 U. S. 556; *Wellsburg, etc. R. Co.* v. *Panhandle Traction Co.*, 56 W. Va. 18, 48 S. E. 746. The instant case is an illustration of a situation where the application of this principle is helpful.

STATUTES — INTERPRETATION — INSURANCE POLICY AS "MOVABLE EFFECTS" WITHIN STATUTORY DOWER. — A married man procured policies of insurance upon his life, payable to his executors, administrators, or assigns. By the provisions of the policy he reserved the power of changing the bene-

ficiary at any time provided the policy was not then assigned. Under a statute which provides that the widow "shall be entitled, by way of dower, to an absolute property in the one-third part of all" her husband's "movable effects in possession, or reducible to possession, at the time of his death," his widow claimed one-third of the proceeds of these policies in the hands of the executors. (1915 HAWAIIAN REV. LAWS, § 2977.) *Held*, that the widow is not entitled to any part of the insurance money. *Estate of Castle*, 25 Hawaii, 38.

For a discussion of principles involved, see NOTES, page 587.

SUNDAY LAWS — SUNDAY CONTRACTS — EFFECT OF DELIVERY ON WEEK-DAY. — A contract for the sale of hay was entered into on Sunday in violation of a statute making such contracts void (1909, REV. STAT. SASKATCHEWAN, c. 69, § 3). On a week day following, the vendor delivered the hay and the purchaser accepted and resold it. The vendor brought an action upon the contract made on Sunday, and in the alternative, for goods sold and delivered. *Held*, that on amending his pleading the plaintiff is entitled to have the defendant account for the proceeds of the resale. *Schuman* v. *Drab*, 49 D. L. R. 59 (Saskatchewan).

Since the Sunday contract was declared void by statute, obviously no rights could be enforced under it. Nor would it be validated by a subsequent recognition on a week day. *Riddle* v. *Keller*, 61 N. J. Eq. 513, 48 Atl. 818; *Day* v. *McAllister*, 15 Gray (Mass.) 433; *Acme, etc. Adv. Co.* v. *Van Derbeck*, 127 Mich. 341, 86 N. W. 786. Had the property been delivered on Sunday, title would not have passed to the purchaser and the vendor would be entitled to maintain replevin or trover. *Winfield* v. *Dodge*, 45 Mich. 355, 7 N. W. 906; *Adams* v. *Gay*, 19 Vt. 358. See 15 HARV. L. REV. 317. But the parties can make a new valid contract on a subsequent week day with reference to the same subject matter. *Sherry* v. *Madler*, 123 Wis. 621, 101 N. W. 1095. This new contract may be implied from dealings with each other's property. *Vinz* v. *Beatty*, 61 Wis. 645, 21 N. W. 787. In the principal case, the subsequent delivery and acceptance is strong evidence of such a new contract. *Bradley* v. *Rea*, 103 Mass. 188. Hence it would seem that the vendor should have recovered on the count for goods sold and delivered. The majority, however, seem to proceed on the theory that there is no evidence of a new contract, and hence that title remained in the vendor and that the sale by the purchaser was a conversion. This view of the facts seems hardly tenable.

TAXATION — CONSTITUTIONAL RESTRICTIONS — RATE IN INHERITANCE TAXATION AFFECTED BY FOREIGN PROPERTY. — The inheritance tax laws of New Jersey provide that the transfer of property within the State owned by non-resident decedents shall be taxed (1909 N. J. LAWS, 325 as amended 1914 N. J. LAWS, 267). This tax is computed by figuring the amount which would be due if the decedent had died a resident with all his property within the State. The actual tax bears the same ratio to this hypothetical tax as the property within the state bears to all the property. A graduated tax is imposed on larger bequests in the case of resident decedents. Suits were brought to test the constitutionality of this method by the representatives of wealthy non-resident decedents. *Held*, that the tax is valid. *Maxwell* v. *Bugbee*, U. S. Sup. Ct., Nos. 43 and 238, October, term, 1919.

For a discussion of this case, see NOTES, p. 582, *supra*.

TAXATION — PARTICULAR FORMS OF TAXATION — INHERITANCE TAX — WHEN A NONRESIDENT IS DOING BUSINESS — WITHIN THE STATE. — Section 220 (1) of the New York Tax Law provides for a succession tax ". . . when the transfer is by will or intestate law of capital invested in business in the state

by a nonresident of the state doing business in the state. . . ." The decedent, Hetty Green, had large sums of money invested in the state, the income of which she usually reinvested there. She also changed her investments from time to time, but she maintained no office for the transaction of business, nor did she hold herself out to the public as a banker, broker, or money-lender. *Held*, that the capital so invested is not taxable under this statute. *In re Green's Estate*, 178 N. Y. Supp. 353.

A prior decision by the same court that this capital was not "invested *in business* in the state by a nonresident *doing business* in the state," was reversed and remitted for further inquiry. *In re Green*, 184 App. Div. 376, 171 N. Y. Supp. 494. In a scholarly opinion, the court has now reasserted its earlier decision. As it points out, the term, "business" is not a word of art at common law. See *The People ex rel. The Parker Mills* v. *The Commissioners of Taxes*, 23 N. Y. 242; *Smith* v. *Anderson*, 15 Ch. Div. 247, 258. Its indefinite connotation in ordinary speech, it likewise points out, and there seems to be no judicial interpretation of any similar statute. The judicial definition of the term in construing statutes dealing with corporations is not binding, since what is not business when done by an individual may often be business when done by a corporation organized for that express purpose. See *Smith* v. *Anderson*, *supra*, 260. Statutes imposing liability upon married women for contracts made while engaged in business are more nearly *in pari materia* with the statute in the principal case, and these were strictly construed. *Nash* v. *Mitchell*, 71 N. Y. 199; *Wheeler* v. *Raymond*, 130 Mass. 247. It is a well-recognized rule that statutes imposing taxes are to be construed strictly against the state. *Crocker* v. *Malley*, 249 U. S. 223; *Gould* v. *Gould*, 245 U. S. 151. In this situation, the decision displays a spirit of fairness and moderation which unfortunately has not always characterized the policy of legislatures and of courts in dealing with the taxation of estates of nonresidents.

UNFAIR COMPETITION — TRADE-MARKS AND TRADE NAMES — "PASSING OFF" BY USE OF DESCRIPTIVE WORD HAVING SECONDARY MEANING. — The plaintiff while holding patents for brushes set in rubber used exclusively the word "Rubberset" in selling its brushes. At the expiration of the patent, the defendant commenced manufacturing brushes set in rubber and sold them with the word "Rubberset" stamped on the handle together with its name as manufacturer. The plaintiff seeks to enjoin the use of the word. The court found that there was no likelihood of purchasers being misled as to whose goods they were buying. *Held*, that the injunction be denied. *Rubberset Co.* v. *Boeckh Bros. Co., Ltd*, 49 D. L. R. 13.

The plaintiff could have no property in a word which was purely descriptive of his product. *In re Swan & Finch Co.*, 259 Fed. 990 and 991. See 12 HARV. L. REV. 349. Nevertheless, words which are merely descriptive often come to have for the purchasing public a secondary meaning, as indicating the product of a particular manufacturer. In such cases, the manufacturer will be, to a certain extent, protected against the use of the word by others. *Shaver* v. *Heller & Merz Co.*, 108 Fed. 821; *Saalfield Pub. Co.* v. *Merriam Co.*, 238 Fed. 1. But the protection is given, not to any property in the word, but to the good will of the business. *Pillsbury-Washburn Flour Mills Co.* v. *Eagle*, 86 Fed. 608; *Crescent Tool Co.* v. *Kilborn & Bishop Co.*, 247 Fed. 299. Consequently, for relief to be granted, it is essential that the public be deceived or confused as to whose wares are being purchased. *Goodyear's India Rubber Glove Manufacturing Company* v. *Goodyear Rubber Co.*, 128 U. S. 598; *M. Werk Co.* v. *Grosberg*, 250 Fed. 968. Conceding the facts found by the court in the principal case, its result follows. But it may well be doubted whether there was not in fact sufficient danger of deception to justify a court in at least compelling the defendants to take active precaution against possible confusion. *Cf. Shredded Wheat Co.* v. *Humphrey Cornell Co.*, 250 Fed. 960.

WASTE — TENANT FOR LIFE WITHOUT IMPEACHMENT OF WASTE — WHETHER ENTITLED TO PROCEEDS FROM ORNAMENTAL TREES TAKEN BY THE GOVERNMENT. —The will of the testator created a tenancy for life without impeachment of waste with successive remainders over. During the possession of the life tenant ornamental trees were cut and taken by the government. Compensation was duly made to the trustees under the will. The trustees took out a summons to ascertain the disposition of the money. *Held*, that it be invested and held to the uses created by the will. *Gage* v. *Piggot*, 53 Ir. L. T. R. 33.

A tenant for life, although at law unimpeachable for waste, will nevertheless be restrained in equity from doing certain acts, termed equitable waste. *Vane* v. *Lord Barnard*, 2 Vernon, 738; *Dincombe* v. *Felt*, 81 Mich. 332, 45 N. W. 1004. See *Chapman* v. *Epperson*, 101 Ill. App. 161. To permit the retention of profits arising from an act which would have been enjoined would plainly be bad policy. Accordingly it has been held that an account of the proceeds of such acts will be ordered. *Garth* v. *Colton*, 1 Ves. 523; *Ormonde* v. *Kynersley*, 5 Madd. 369. A reversioner under such circumstances has even been allowed an action on the case, with the aid of a statute substituting such action for the old action of waste. *Stevens* v. *Rose*, 69 Mich. 259, 37 N. W. 205. But see *Belt* v. *Simkins*, 113 Ga. 894, 39 S. E. 430. It would seem, then, that a tenant for life unimpeachable for waste is in equity treated, in regard to equitable waste, much the same as is an ordinary life tenant in regard to legal waste. See *Honywood* v. *Honywood*, L. R. 18 Eq. 306, 311. The proceeds of timber which the former kind of tenant might rightfully cut may be retained by him. *Baker* v. *Sebright*, 13 Ch. Div. 179. If, on the other hand, he cuts timber which could not have been cut rightfully by such a tenant, — *e. g.* ornamental timber — he cannot have the proceeds. *Honywood* v. *Honywood*, *supra*. The fact that a trespasser cuts the timber will not change his rights. See *Anonymous*, Moseley, 237. The result will be the same where the timber is felled by accident or an act of nature. *In re Harrison's Trusts*, 28 Ch. Div. 220. The principal case logically applies the same rules when the government cuts under eminent domain. The same interests should be allowed to enjoy the proceeds as would have enjoyed the property; the accident of the cutting should not increase or lessen their interests. *In re Harrison's Trusts*, *supra*. The case is not without importance in the United States, since a tenant in fee subject to an executory devise is treated like a tenant for life without impeachment of waste. *Turner* v. *Wright*, 2 De G. F & J 234; *Gannon* v. *Peterson*, 193 Ill. 372, 62 N. E. 210.

WILLS — CONSTRUCTION — DISINHERITANCE BY EXPRESS CLAUSE IN WILL WITHOUT AFFIRMATIVE DISPOSITION TO ANOTHER. — A will which purported to dispose of all of the testator's property contained the provision that the testator's brother A "is not to have one penny" for a stated reason. Upon the lapse of certain legacies, A claimed as next of kin his share of the residue thus resulting. *Held*, that he may take. *Muir* v. *Archdall*, 19 New South Wales, 10.

According to the orthodox view, an heir cannot be excluded from taking by descent his share of the testator's estate except by a complete disposition of the property by will. *Duff* v. *Duff's Ex'rs*, 146 Ky. 201, 142 S. W. 242; *Bradford* v. *Leake*, 124 Tenn. 312, 137 S. W. 96. See 1 JARMAN ON WILLS, 6 ed., 335. This rule proceeds upon the theory that the testamentary power is merely a matter of statutory privilege, in derogation of the common law of descent and inheritance; and accordingly, that the testator has no greater powers than those granted by the statutes, which in terms refer only to affirmative disposition. See *Coffman* v. *Coffman*, 85 Va. 459, 461. See PAGE ON WILLS, § 21. This doctrince is applied where there is a partial intestacy due to the invalidity of testamentary dispositions. *Parsons* v. *Millar*, 189 Ill. 107, 59 N. E. 606. Another view holds that the exclusion of one or several of the next of kin might be regarded as a gift to the others by implication, so that in final effect

there is a complete disposition by will. *Bund* v. *Green*, 12 Ch. Div. 819; *Tabor* v. *McIntire*, 79 Ky. 505. This doctrine seeks to give effect to the testator's intention and yet to keep within the reason of the older view. As a matter of construction, the result of the orthodox view might often, but not always, be reached by the aid of the presumption in favor of heirs as in the principal case. *In re Plumly's Estate*, 261 Pa. 432, 104 Atl. 670; *Young* v. *Quimby*, 98 Me. 167, 56 Atl. 656. On principle, the intention of the testator should control, and negative words alone, even without positive disposition to others, should be sufficient to disinherit.

WILLS — CONSTRUCTION — WHETHER LIFE ESTATE OR ABSOLUTE INTEREST. — The testator by his will gave to his wife "all my property, both real and personal, to have hold and use for her own exclusive benefit so long as she shall live." The executor was the only other person named in the will. *Held*, that the widow took an absolute interest in the entire estate. *Gilham* v. *Walker*, 12 Queens. L. R. 9.

The absence of words of inheritance in a devise will not deprive the devisee of the fee in realty where it appears from the whole will that the testator intended to give an absolute interest. *Richardson* v. *Noyes*, 2 Mass. 56; *Defreese* v. *Lake*, 109 Mich. 415, 67 N. W. 505. In the principal case, however, the language would seem to point clearly to a life estate only. It is true that words similar in tenor to "have hold and use for her own exclusive benefit" have been construed to give the devisee power to alienate the fee. *McGuire* v. *Gallagher*, 99 Me. 334, 59 Atl. 445; *Newlin* v. *Phillips*, 60 Atl. 1068 (D. Ch.). But a life estate in real property, expressly created, will not — at least, if remaindermen are designated — be enhanced into a fee by reason of its being accompanied by an unlimited power of disposition. *Archer* v. *Palmer*, 112 Ark. 527, 167 S. W. 99; *Mansfield* v. *Shelton*, 67 Conn. 390, 35 Atl. 271. To distinguish these cases the fact may be seized upon that, in the principal case, no remaindermen are named; for such a designation is an indication of the intention of the testator that the first named beneficiary is to have a life estate only. *Hill* v. *Gianelli*, 221 Ill. 286, 77 N. E. 458. Nevertheless, the decision seems to be an extreme illustration of a mechanical application of rules of construction.

WILLS — HOLOGRAPHIC WILLS — REQUISITES — SUFFICIENCY OF DATE. — An illiterate man, ill in a hospital, wrote a letter on one sheet of paper, which, after corrections in spelling, was as follows: "4/ 12/ 17th. Maude Clarke, 351 Jones Street, Brookfield Apartments, Apartment 201. I leave her $2,000.00 more, cash money. Jack Olssen. My mind is clear. I leave her all. Jack Olssen." The lower court admitted this letter to probate as a holographic will, holding the dating to be sufficient, and admitting the testimony of the nurse that the entire letter was written at one time, and that it was delivered to the proponent for safe-keeping. *Held*, that there was no error. *In re Olssen's Estate*, 184 Pac. 22 (Cal.).

In a number of states a testamentary paper wholly in the handwriting of the testator is a valid will without attesting and subscribing witnesses. But the statutes controlling such holographic wills vary in some particulars. California, Louisiana, and Montana specifically require that such a will be dated. See 1915 CIV. CODE OF CAL., § 1277; 1912 REV. CIV. CODE OF LOUISIANA, Art. 1588; 1907 REV. CODE OF MONTANA, § 4727. To constitute a good date, the month, the day of the month, and the year must be given. *In re Anthony's Estate*, 21 Cal. App. 157, 131 Pac. 96; *Heffner* v. *Heffner*, 48 La. Ann. 1088, 20 So. 281. Place of execution is not part of the date. *Stead* v. *Curtis*, 191 Fed. 529. Usual abbreviations are valid. *In re Chevallier's Estate*, 159 Cal 161, 113 Pac. 130; *In re Lakemeyer's Estate*, 135 Cal. 28, 66 Pac. 961. But the omission

of any element of the date is fatal. *In re Carpenter's Estate*, 172 Cal. 268, 156 Pac. 464; *In re Vance's Estate*, 174 Cal. 122, 162 Pac. 103; *In re Noyes' Estate*, 40 Mont. 190, 105 Pac. 1017. If the paper is properly dated it is presumed that the entire paper was written at one time. *La Grave* v. *Merle*, 5 La. Ann. 278. Arkansas and Tennessee require that the handwriting of the testator be proved by three disinterested witnesses in the case of realty and two such witnesses in the case of personalty. *Ex parte Hoerner*, 27 Ark. 443. See 1917 SHANNON'S CODE OF TENN., § 3896. The usual provision as to the custody of a holographic will is that it must be found among the valuable papers or effects of the testator or lodged in the hands of any person for safe-keeping. The beneficiary is a proper person. *Alston* v. *Davis*, 118 N. C. 202, 24 S. E. 15. While it would be desirable not to allow holographic wills, or, if they are sanctioned, to have strict requirements rigidly enforced, the instant decision is correct under the California statute.

WILLS — PROBATE — DOCUMENTS AND STATEMENTS ENTITLED TO PROBATE. — A soldier *in expeditione* indicated, in a letter to his wife, certain desired changes in his will, and requested that his solicitor be notified to alter it accordingly. The soldier died before such alteration was made. The letter was offered as a testamentary document. *Held*, *obiter*, that it should be received. *Godman* v. *Godman*, [1919] 2 P. 229, 233.

The authorities are divided as to the legal effect of such expressions indicating the decedent's desires as to the *post-mortem* disposition of his property. Testamentary character has been ascribed to them when the deceased had no opportunity to execute the contemplated will or codicil. *Gattward* v. *Knee*, [1902] P. 99; *McBride* v. *McBride*, 26 Gratt. (Va.) 476, 482. Such expressions, though unaccompanied by an intent that they should themselves operate in a testamentary capacity, have been admitted to probate. *Toebbe* v. *Williams*, 80 Ky. 661; *Alston* v. *Davis*, 118 N. C. 202, 24 S. E. 15; *Mulligan* v. *Leonard*, 46 Iowa, 692. But other courts require that the statement indicate, on its face, an intent to make it a testamentary one. *Waller* v. *Waller*, 1 Gratt. (Va.) 454. Similarly, a death-bed utterance was considered inadmissible, as a nuncupative will, since the deceased was unaware that the law ascribed a testamentary character to it. See *Campbell* v. *Campbell*, 21 Mich. 438, 444. Probate has also been refused to memoranda of intended testamentary dispositions, despite full compliance with the formal requisites of a will. *Hocker* v. *Hocker*, 4 Gratt. (Va.) 277; *Popple* v. *Cunison*, 1 Add. Eccl. 377. But see *contra*, *Haberfield* v. *Browning*, 4 Ves. Jr. 200, note; *Scott's Estate*, 29 W. N. C. (Pa.) 176; *Barwick* v. *Mullings*, 2 Hagg. Eccl. 225. But the true test seems to be neither the legal knowledge of the deceased nor the technical wording of his statement, but the one formulated in the principal case: whether, assuming the necessary formalities to have been observed, his statement was a deliberately expressed desire as to the disposition of his property to be made after his death. Authority, as well as principle, supports the adoption of this test. *Bartholomew* v. *Henley*, 3 Phillim. Eccl. 317; *Barney* v. *Hayes*, 11 Mont. 571, 29 Pac. 282; *Dalrymple* v. *Campbell*, [1919] P. 7.

WILLS — REVOCATION — DEPENDENT RELATIVE REVOCATION BY WRITTEN INSTRUMENT. — The testator made a valid will. Later he obtained a printed form on which these words among others appeared: "I hereby revoke all wills by me at any time heretofore made." This blank form was duly executed, and afterwards various devises and bequests were written in by the testator, but the complete instrument was never executed. *Held*, that the revoking clause is inoperative. *In Goods of Irvine*, 53 Ir. L. T. R. 143.

An act of revocation, such as tearing or canceling, will not be given effect where the intent to revoke was dependent upon some later event which never

happened, as, for example, the valid execution of a new will. *Dixon* v. *Solicitor to the Treasury*, [1905] P. 42; *Strong's Appeal*, 79 Conn. 123, 63 Atl. 1089. The courts treat revocations by duly executed written instruments in the same manner. *Rudy* v. *Ulrich*, 69 Pa. St. 177; *Security Co.* v. *Snow*, 70 Conn. 288, 39 Atl. 153. Unless the condition is expressed in the writing this would seem contrary to the parol evidence rule. See *Sewell* v. *Slingluff*, 57 Md. 537, 549. If, however, in these cases we regard the courts as setting aside a legally binding revocation upon the equitable ground of mistake, this objection is removed, but we meet the difficulty that the mistake is usually one of law, and often, as in the principal case, a mistake as to the future, not as to existing facts. The American authorities, while treating such written revocations as conditional, lay down the rule that, if the condition fail because of something "*dehors* the will," the revocation is binding. *In re Melville's Estate*, 245 Pa. St. 318, 91 Atl. 679; *Blakeman* v. *Sears*, 74 Conn. 516, 51 Atl. 517. But in the principal case we find the condition fails because of faulty execution — something within the will so far as anything can be — and so the revocation would be ineffective. The principal case may be supported upon the further ground that the evidence may not have shown that the testator when he signed had the necessary *animus revocandi*. See *Estate of Meyer*, [1908] P. 353; *Fleming* v. *Morrison*, 187 Mass. 120, 72 N. E. 499.

BOOK REVIEWS

Justice and the Poor. A Study of the Present Denial of Justice to the Poor and of the Agencies Making More Equal their Position before the Law, with Particular Reference to Legal Aid Work in the United States. By Reginald Heber Smith of the Boston Bar. Published for the Carnegie Foundation for the Advancement of Teaching. New York: Charles Scribner's Sons. 1919. pp. xiv. 271.

In this admirable study of the administration of justice as it affects the poor in the American city of to-day we have an example of the change which has taken place in legal thought in the present generation. Not long ago judges were telling us that an act requiring employees to be paid in cash and not in orders on a company store placed the laborer "under guardianship," were asking "what right has the legislature to *assume* that one class has the need of protection against another,"[1] and were asserting that "*theoretically* there is among our citizens no inferior class."[2] To-day we are not satisfied with abstract conceptions divorced from actual life, but seek to know the concrete situation and the actual effect of legal rules and of the judicial administration of justice thereon. Where a generation ago we were content to consider only the abstract justice of the abstract rule, to-day we insist on looking at law functionally. The question is what it does and how it does it, and abstract justice of the content is no longer held to justify concrete injustice in application. Lawyers more than others still cling to the nineteenth-century faith in the abstract justice of an abstract universal rule as something valuable in itself, be the results what they may. Hence it is significant of a happy change in the professional attitude that lawyers have given us the two concrete studies which must be consulted above everything else by

[1] State *v.* Haun, 61 Kan. 146, 161. [2] People *v.* Frorer, 141 Ill. 171, 186–187.

sociologists, social workers, and legislators, as well as by members of the bar who are desirous of improving the law.

Mr. Smith's book will stand with Judge Parry's "Law and the Poor" as an indispensable storehouse of information and source of ideas. But valuable as the book will be for the nonlegal worker in the social sciences, we are here concerned primarily with its interest for the lawyer. And at the outset we may insist on the service of this presentation of facts from actual first-hand knowledge in shaking the ideas which lawyers have been wont to acquire through habits of abstract and *a priori* handling of legal questions. Their habit of working out all possible difficulties by a purely logical process and their instinctive fear that something may open a way for magisterial caprice have made them much more critical of projects for improving the law than fertile in devising them. Hence the most effective agencies of to-day have been worked out by laymen and are in the hands of administrative rather than judicial officers. Such institutions as workmen's compensation, in which the statute is framed with reference to the end rather than solely with reference to the abstract justice of the means, may teach us much as to matters which are still within the domain of judicial justice.

Few have been in a position to perceive how our legal system has been functioning and is functioning with respect to the interests of the mass of inhabitants of the modern city. Lawyers need to realize that in practice the poor are not merely without protection but the law itself is often made an affirmative engine for oppressing them (p. 9). Lay writers, who have been too prone to interpret such phenomena in terms of class interest or class struggle, need to learn that this is not at all a matter of rich and poor or employer and employee; that the state of our procedure and the organization of our tribunals enable the poor to despoil one another and permit "the shrewd immigrant of a few years' residence to defraud his recently arrived countrymen" (p. 9). Much of the prejudice which the mere title of the book has excited in some quarters may be dispelled when it is found that Mr. Smith's investigation discloses, not a class line, but the old-time cleavage between the honest and the dishonest. The poor man is the prey of a host of petty swindlers who have learned how to use the powerful and ruthless weapon of the law. Businesses exist and flourish by unscrupulous exploiting of a state of things in which "as against the poor the law can be violated with impunity because redress is beyond their reach" (p. 10). Lawyers should reflect seriously upon this use of law as an engine of extortion and upon the failure of abstractly good laws because learned and well-intentioned courts have too often made remedial legislation nugatory by construing statutes in the light of the common law instead of in the light of the social situation back of them (p. 14). Here again the vice of our purely abstract methods becomes apparent. As we habitually argue such questions in court, the tribunal is seldom in a position to appreciate the concrete social facts to which a statute is to be applied. Many good lawyers even now take offense at the means devised by Mr. Justice Brandeis while at the bar to assist the courts in reaching a juster and more complete view of what may have been before the legislator and behind his enactment. But Mr. Smith furnishes us convincing evidence that the classical criterion of old law, mischief and remedy, when applied only from the materials furnished by

the law books and the general knowledge of the bench, will not suffice to make such legislation meet the ends of the law, and adds weight to the demand for better means of informing courts upon the extra-legal conditions material to application and interpretation of law, which has often been urged on general grounds.[3]

On other points, on which lawyers have been better informed of recent years, Mr. Smith reinforces by direct evidence conclusions which are coming to be held more or less widely in the profession. The inadequacy of our procedural and administrative machinery to make the substantive law effective for its purpose has come to be generally conceded. It is gratifying to note that much if not all that agitators have attributed to class dominance, that exponents of the economic interpretation have traced to the self-interest of employers, and that the muckrakers of a decade ago explained by bad men in judicial office and sinister influences behind courts, is shown to be merely the result of a rapid development of urban conditions to which the judicial organization and legal procedure of the rural pioneer America of the past was unsuited (p. 15). But the lawyer's duty goes beyond recognition of the one proposition and establishment of the other. He is called to discover and to employ the scientific means of improvement which only the expert may know or may wield effectively. And in this connection the thoughtful lawyer may learn much from this book. For one thing, it is full of illustrations of the need of a ministry of justice (or its equivalent) in our several commonwealths. When all legislative improvement in law is left to the private initiative of those who have a pecuniary interest in change, we may expect that while automobile associations and hotel keepers' associations and lumber dealers' associations give our judiciary committees plenty of occupation, it will be no one's business to make legal procedure a better engine of justice in the general run of cases, and that practical justice to the bulk of our urban population will be overlooked. If it were some one's business to study the matter and to push with authority the measures which his study showed to be needed, many parts of the substantive law could be made more efficacious exactly as has been done in the case of workmen's compensation (p. 87). Must we wait for the inevitable demagogue to organize a political agitation in support of some crude but specious remedy, and then confine ourselves to criticism?[4]

Even the common law suffers from a system or want of system wherein questions of grave import to large numbers of people are only brought before our highest courts when some individual litigant is able and willing to spend time and money in an appeal, and are either left undecided or are presented and argued by one side only. This situation has been too common under workmen's compensation acts, where only the insurance companies could afford to go to the ultimate court of appeal (pp. 27, 207) and in connection with the law of landlord and tenant as applied to tenancies at will or periodical tenancies in cities (p. 207). As Mr. Smith says

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[3] Willcox, "The Need of Social Statistics as an Aid to the Courts," 47 AMER. L. REV. 259; Palfrey, "The Constitution and the Courts," 26 HARV. L. REV. 507. See also 2 GENY, MÉTHODE D'INTERPRÉTATION, 2 ed., § 185.

[4] On this matter reference should be made to the report of the English MACHINERY OF GOVERNMENT COMMITTEE, 63–78 (1918). Lord Haldane was chairman of this committee. See also 1 NASH, LIFE OF LORD WESTBURY, 191 *ff*.

justly, "one-sided argument inevitably tends to produce a one-sided construction of the law" (p. 27).

Again, we should reflect seriously upon the increasing use of the criminal law to secure the interests of the poor in cases that ought to be dealt with on the civil side of our courts (pp. 75, 97). It is a reproach to the administration of justice that harsh and summary measures, at best involving hardships and in practice often involving much more, should afford the only assured remedy in large classes of cases involving wages or domestic relations. Even more we should reflect upon the increasing resort to administrative officials — not tribunals — doing summary justice by administrative action, to do the work that falls in theory upon courts and lawyers (pp. 94–97). The powers of the labor commissioner in Massachusetts (p. 97), of the supervisor of small loans in Massachusetts (p. 95), and of the commissioner of agriculture in Virginia (p. 95) are significant of a reliance upon summary administrative methods wholly at variance with our common-law polity which the profession cannot afford to ignore. Here again a ministry of justice, charged with the duty of studying the situations that give rise to such legislative extensions of administrative power and devising effective legal remedies therefor, might give us better solutions and preserve our legal inheritance.

Bar associations almost everywhere are now awake to the need of better organization of courts. Much valuable material on this subject is afforded by Mr. Smith's investigations (pp. 54–55, 74). Another recognized item in recent programs of procedural reform is regulation of procedure by rules of court. Here also important new evidence is adduced. For instance, "there is no reason why a court summons should read . . . so that it is necessary to employ counsel to explain that the plain English words do not mean what they say," on pain of wasting time in futile attendance on courts (pp. 33–34). But such changes as are needed are not for the legislature. If courts had control of the form of process and the administrative side of the courts were well organized, a rule of court would speedily obviate a source of much expense and irritation. Indeed an impressive case is made for better organization and development of the administrative side of the courts. Such things as the simplification and standardization of complaints in some domestic relations courts so that a wife may make out all necessary papers herself with slight assistance from the clerk (p. 78), as the adjustment of the hours of sitting to meet the needs of a working population in other courts of this sort (p. 77), as the preparation of cases for trial by probation officers (p. 78), as the system of ascertaining who are available for assignment as counsel, worked out by legal aid societies in this country, but provided by the courts in Scotland and recently under rules of court in England (pp. 101–102) — these examples of what may be done when thought is given to the administrative organization of tribunals are full of lessons for our higher courts. Much as lawyers have discussed contingent fees, they have given little or no thought to the machinery that might take care of the many cases which cannot pay even a contingent fee (p. 38). The system of costs is well known to be full of anachronisms, and the traditional argument that costs deter rash and unfounded litigation proves to be only an *ex post facto* reason behind a mass of abuses. Costs "are too

low to deter the rich but high enough to prohibit the poor" (p.23). Where courts have been given power to regulate costs by rules and to simplify procedure by rules so as to obviate them, no orgies of rash litigation have followed. On the contrary, "it is the general opinion that fewer and certainly no more fraudulent claims for personal injuries are presented to Industrial Accident Boards where there are no costs than were formerly brought to courts where fees obtained" (p. 20). We ought to learn from such cases what might be done in our higher courts were they well organized on the administrative side and were they given adequate powers of rule-making. This is brought out especially in connection with service of process by mail. Experience has amply refuted all the *a priori* objections which lawyers are fond of urging against this much-needed simplification of an expensive proceeding (p. 26). No doubt strong judges will be needed where this power is committed to the courts. But Mr. Smith has shown abundantly that strong judges are imperative in courts of summary procedure dealing with petty litigation (pp. 47–48, 66–67), and if we have been able to find strong judges for such courts it ought not to be impossible to find them for the higher courts.

If a large task lies before the profession in modernizing the organization, the administrative machinery, and the procedure of our higher courts, we may look forward to it with less apprehension when we read Mr. Smith's account, from the sources and from first-hand investigation, of the small claims courts, courts of conciliation, and domestic relations courts which have arisen in the past decade. Here we find examples of what to avoid as well as models to be followed. Thus, in the Kansas Small Debtors' Courts, with narrow jurisdictional limits, with their distinct organization, going back to the old policy of a new court for every new need, and their attempt to provide justice without trained judges and without law for the petty litigant, we find courts which "at the present time . . . are superior to the act which formed them" (p. 45), but which will hardly commend themselves as models. On the other hand, the Portland (Oregon) Small Claims Court (p. 47), the Chicago Small Claims Court (pp. 51–52), and above all the Cleveland Small Claims Court (pp. 49–50), afford examples of modern organization which deserve careful study. In all these courts, as well as in the Courts of Conciliation (pp. 60–65), the stock *a priori* objections to such tribunals have proved unfounded. If they have encouraged litigation, it has been just and proper litigation where hitherto justice had not been accessible. Instead of being flooded with cases by collection agencies, they have put an end to a situation which played into the hands of such agencies (p. 54). Mr. Smith's study of the collateral functions of these courts (pp. 56–59) is also full of meat for those who are chiefly interested in the higher courts.

What strikes one particularly as he reads of the Small Claims Courts, the Conciliation Courts, and the Domestic Relations Courts, is the great development of the administrative side of these tribunals, the giving over of the purely contentious conception of a judicial proceeding, and the doing by the court of what in our ordinary courts must be done for each party by or through an attorney (*e. g.*, in the Domestic Relations Courts (p. 78)). But it is in these very respects that the administrative tribunals, which continue to spring up on every hand, have found the decisive ad-

vantages that have made them so popular. In spite of the suspicion which these novel features must needs create in the mind of the common-law lawyer, the event is showing that judicial tribunals of this type can and do administer justice in accord with the substantive law and to the general satisfaction of litigants, and that the elimination of involved and detailed procedure is not in any way incompatible with the general security. Experience of these new judicial tribunals may well assure the bar upon this point and pave the way for like developments in the higher courts. Otherwise, rise of administrative tribunals and shifting of the administration of justice thereto may leave the common-law courts no more than the shadow of their old-time jurisdiction.

Lawyers will also be interested in the discussion of the Public Defender and the author's conclusion, which appears well warranted, that "as the probation branch is indispensable to every criminal court, the sounder line of development would seem to be to entrust this service to the probation officers rather than to duplicate the work and create new officials" (p. 127). As in so many other cases, we have sought to remedy ill effects of the want of modern organization by multiplying officers rather than by going to the root of the difficulty.

Finally, attention should be called to the chapter on Legal Aid and the Bar (pp. 226–239), which contains much that lawyers should take to heart.

In making Mr. Smith's investigations possible and publishing the results of his work the Carnegie Foundation has done a conspicuous service to the law.

ROSCOE POUND.

PRINCIPLES OF THE LAW OF CONTRACTS. By Sir William R. Anson. Fourteenth English edition, third American edition, with American notes by Arthur L. Corbin. New York: Oxford University Press. 1919. pp. v–568.

To the frequently repeated assertion that Anson on Contracts is the best book on the subject, I have for many years replied, "Possibly, but what a distressingly humiliating confession." We are now up to the third American edition. It is based either upon the fourteenth English edition, according to the title-page, or upon the twelfth, according to the preface. Immaterial. Plenty learning there is. Plenty industry. Plenty phraseologies which ought long ago to have been discarded. Some useful analysis. Little attempt at synthesis. No effort at the eradication of time-dishonored grotesqueries. The whimsies of the "authorities" (Authorities always impede progress) once more treated with uncritical adoration.

Quasi-contracts. — Certain heterogeneous classes of cases, which have in common conspicuously this, that they are *not* contracts, are huddled together, put into a class, and called *quasi*-contracts — by translation, *as-if*-contracts (sections 8, 271–273, 402, 475). The book tells us that the term is "convenient" (sec. 5). I call it stupid, or, at best, slipshod. Why we should group "a multifarious class of legal relations" (in none of which agreement is ever a constituent factor) under the word "contract" (from which agreement is never absent), or under the meaningless phrase "as-if contracts," is something beyond my comprehension. Do not refer me to bygone days when none of the terms was understood. I am speaking of the third American, based upon the twelfth or fourteenth English, edition of Anson on Contracts. Are ancient crudities entitled to greater respect than modern? Is not the ashpit the proper place for old and young alike?

Unilateral Contracts. — Another kind of contracts which do not exist (I plead the book) is unilateral contracts (sec. 24). A unilateral contract is as unthinkable as a unilateral elephant, or anything else which necessarily has two sides. Nobody would call a monologue a unilateral conversation, or a soprano solo a unilateral duet, or a lecture a unilateral debate. Then why call a promise a unilateral contract? The two things, promise and contract, have this in common, that in both the presence of two parties is necessary; but in a promise there is but one actor, while in contract there are always two actors. In other words, a promise is always unilateral, and a contract is always bilateral at least. The book tells us that in simple contracts there is an "act for a promise," a "promise for an act," or a "promise for a promise" — always two actors. How then can there be a unilateral contract?

One way, we are told, is by a "contract under seal," when one party makes a promise without receiving any consideration for it (sec. 23). But that is to call a promise a unilateral contract — which would be as sensible as calling a lonely run a unilateral foot race, or a single baby unilateral twins.

Another sort of unilateral contract, the book tells us, is a promissory note (sec. 24, note). But a promissory note is a promise, and is not in the least like a contract. Observe this: In consideration of the transfer of a horse, A agrees to hand to B, within three days, a promissory note for $200 endorsed by, etc. That is a contract. There are two actors. The promissory note, when given, is not another contract; it is a promise. When the book indicates that a contract may consist of a "promise for a promise," one would not expect that a promise would itself be said to be a contract, whether unilateral or other. If I were to call two reciprocal promises a bilateral promise, instead of a contract, you would tell me that I was making a mess of my vocables. Ought I to be less frank when you call a single promise a unilateral contract, instead of what it is?

Agency from Necessity. — In section 444 the book tells us: "Circumstances operating upon the conduct of the parties may create in certain cases agency *from necessity*. . . . A husband is bound to maintain his wife: if therefore he wrongfully leave her without means of subsistence she becomes 'an agent of necessity to supply her wants upon his credit.' . . . In all these cases the legal relations between principal and agent do not arise from agreement; they are imposed by law on the parties without their consent in order to promote general welfare."

I presume that the "necessity" is that of ascertaining some legal basis upon which to found liability: No man can be made liable for what neither he nor his agent orders; the deserted wife was not an agent; therefore — What? — therefore the fact must be changed, and the wife must have been an agent. Can anything be more absurd? Why did not the writers question the validity of the major premise? Do not tell me that one hundred and seven years ago a judge spoke of "an agent of necessity." I know that. But the judge is dead, and the evil which he did ought to have been buried with his bones.

Why did the writers overlook such a glorious opportunity for the introduction of the "quasi" idea? Why not say that the wife was an "as-if" agent? That looks like burlesque; but *quasi-agent* is quite as respectable a conception as *quasi-contract.* Or why did not the writers declare that the wife was a "unilateral" agent? That would be, no doubt, to posit an agent without a principal. But unilateral bilateralia must always be somewhat anomalous (Pistol practice as a unilateral duel is a good example). And the conception is not a whit more objectionable than that of a unilateral contract. That two people can draw together (*con* together, + *trahere*, draw = contract) by one of them drawing by himself, is a notion that even Lord Dundreary's poor wit would have rejected. For, commenting on "Birds of a feather flock together," he said: "Of course they do. One of them could not go into a corner and flock

all alone." Might we say that the one in the corner was doing a unilateral flock?

Plainly the trouble lies in uncritical acceptance of the major premise above referred to. It is not true that a man cannot become liable except by action of himself or his agent. When, for example, by statute I am made liable to pay certain municipal taxes, and when the taxes are declared to be a lien upon my property, accompanied by a power of sale in case I fail to pay, nobody has ever based liability of me and my property upon a fictitious agency "from necessity" (What a mess!) of the municipality. It has been deemed sufficient to say that the law had declared that, without any act of mine or on my behalf, either by a voluntary or an imposed agent, I am liable to pay. Why, then, might not we say that under certain other circumstances I may be made liable for groceries purchased *without* my authority? That in the former case the law was embodied in a statute is, of course, immaterial. Our judge-made law has the same compelling force; and it, too, may some day go into a statutory code.

Agency by estoppel. — In 1900, in my book on Estoppel, I distinguished among the cases in which an unauthorized act bound the person on whose behalf it was done, as follows:

1. If an agent acts within what appears to be his authority, the principal is bound.

2. If an agent appears to be acting within his authority, the principal is bound (p. 501).

Some years ago the distinction was carried (without acknowledgment of source) into Halsbury's Laws of England. Anson and his editor are aware of the first of the propositions, but do not appear to have heard of the second. And yet, without it, scientific distribution of the cases cannot be made.

Again, in section 453 the book tells us: "It should be observed — indeed it follows from what has been said — that X cannot by private communications with A, limit the power which he has allowed A to assume." This is followed, as illustration, by a case in which it is said that "Jones, however, forbade Russell to draw and accept bills." Jones could not do it, but actually did it. What the writers meant to say was that although Jones could, and did, limit Russell's authority, yet he (Jones) was liable.

Ratification. — The book entirely ignores the fundamental difficulty about ratification (sec. 445). The usual "rules" are sufficiently stated, but the writers appear to be unaware of the objection to the whole doctrine. If A agrees to sell, and X, on behalf but without the authority of Y, agrees to purchase a horse for $200, no contract has been created. A is not bound to sell, and Y is not bound to purchase. Nevertheless the book speaks of such a futility as "*a contract* made without authority" — which, like unilateral contracts, is a mere contradiction in terms. Commence with that, and you easily slip still farther — into such language as this, for example: "a contract of insurance made by an agent without his principal's authority" (p. 514); whereas, under such circumstances there is no agent, and no principal, and no contract.

The question which the book fails to notice is: If when the document above suggested was signed it was nothing at all (except a misrepresentation by X), how can it become a contract by the act of somebody who was not a party to it? If we call it a *contract* made by an *unauthorized agent*, we may drift into ratification. But if it was nothing, can Y treat it as an option in his favor, which he may exercise or not as he pleases? A did not intend to give an option. The doctrine of ratification declares that that is precisely what he did.

Burden of Proof. — In discussing the burden of proof (sec. 369), why is Professor Thayer's illuminating distinction between the burden of proof and the burden of going forward ignored?

Waiver. — Nowhere in the book is there a wider departure from sanity than in the sections relating to waiver (secs. 151, 365, 366, 412–414, 430). Criticism

here subsides into silent, suffering condemnation. The writers have seen my book on "Waiver distributed among the departments Election, Estoppel, Contract, and Release," but it has not been of the slightest service to either of them.

And so, to the frequently repeated assertion that Anson on Contracts is the best book on the subject, I am still constrained to say, "Possibly, but what a distressingly humiliating confession!"

JOHN S. EWART.

OTTAWA, CANADA.

CELEBRATION LEGAL ESSAYS. By Various Authors. To Mark the Twenty-fifth Year of Service of John H. Wigmore as Professor of Law in Northwestern University. Chicago: Northwestern University Press. 1919. pp. 602.

This collection of articles, first fittingly published in the *Illinois Law Review*, is now issued in a single volume, with a useful index. While *Festschriften* have not been common in this country — that presented by his colleagues to Professor Langdell being among the first — this occasion is well justified by Professor Wigmore's distinguished career.

His first professional appointment, in a Japanese university, naturally turned Wigmore's attention to the general principles, rather than the details, of the common law; and immediately upon his return to this country and his appointment to the Northwestern University he began to give us the results of his speculative thought. His legal masters were, like those of most of us in that day, Thayer and Ames; and it is significant that Wigmore's most fruitful work has been in their fields, Evidence and Torts. From Ames he acquired the power of legal generalization which he has so nobly used in his analysis of the law of Torts; from Thayer the historic method and the point of view which he has worked out in his monumental book on Evidence. But while he has individually and originally developed these suggestions of his masters, Wigmore's great achievement as a legal scholar, his chief claim to fame, above his marked originality of analysis and his incisive individuality in construction, is his patient, energetic massing of his materials, his thorough and lawyerlike presentation and consideration of his evidence, his open-minded dealing with theories and arguments. His "Evidence" is the last word on the subject, because it covers everything that can profitably be said about it; his remarkable collection of materials for the study of Torts gets its chief value from the fact that one need not step outside its covers to find what material one requires. A classmate delights to lay at Wigmore's feet this slight word of appreciation for the individuality, the originality, and the scholarship of his friend.

Are the articles worthy of their occasion? That could hardly be expected of all of them. *Inter arma leges* at least *minime dicunt*. Out of thirty-three articles it is a pleasure to find at least eight of adequate quality. If one were to be selected for special commendation, the reviewer would name the remarkable study on Liberty of Testation by Professor McMurray. The other twenty-five are for the most part slight, but none profitless. As a collection it is worthy of serious study.

JOSEPH H. BEALE.

THE GROTIUS SOCIETY: PROBLEMS OF THE WAR. Volume II. London: Sweet and Maxwell. 1917. pp. xxv, 178.

This is a collection of the papers read before the Grotius Society in 1916. The rules of that body say that "it shall be a British Society." As many of the opinions on international law expressed in the present war by citizens of belli-

gerent countries have been so partisan as to cast discredit both upon the authors and upon the science in which they have been supposed to be experts, the reader inevitably opens this volume with suspicion. Yet these papers are scientific and fair. This is extraordinary in view of the topics covered: "The Treatment of Enemy Aliens;" "The *Appam*;" "The Principles Underlying the Doctrine of Contraband and Blockade;" "War Crimes;" "The Nationality and Domicil of Trading Corporations;" "Neutrals and Belligerents in Territorial Waters;" "The Treatment of Civilians in Occupied Territories;" "War Treason;" etc.

For an American there are at least two papers of peculiar interest. The one entitled "The *Appam*" serves as a valuable commentary on the case eventually decided March 6, 1917, and reported in 243 U. S. 124, under the title "The Steamship *Appam*." The paper on "The Principles Underlying Contraband and Blockade" frankly objects to the American historic attitude regarding the rights of neutrals, and raises the suspicion that the author does not recognize the abnormalness of war and actually believes, after the fashion of militarists, in a duty of neutrals to give up their commerce or at least to modify their commerce in the interest of belligerents; but it is noticeable, and creditable, that the success of the author's contention would have been detrimental to the British, as the author well knew, for he said (p. 28) that "it is beside the mark to dwell on the fact that in the present desperate struggle Great Britain and the Cause of Right are vastly benefiting, in view of the British control of the sea."

An unfortunate mark left upon the papers by war is the evidence of haste, for the writers worked rapidly in view of special emergencies, and there was not time for thorough research. Thus in the paper on "The Treatment of Enemy Aliens," instead of beginning, as a man with leisure might begin, with the forty-first article of the Magna Charta of 1215, "the writer does not propose to go back to the times before the birth of International Law, but limits himself to the provisions of such treaties bearing on the position of enemy aliens on the outbreak of war as are accessible at the moment" (p. 2); and the result is that he begins with 1659, a date quite early enough for practical purposes. Indeed, perhaps it is wrong to suggest a regret that there are marks of haste, for the cause of those marks is also the cause of a certain sprightliness and shrewdness not always found in the work done by men of leisure. However that may be, it is certain that as yet there has appeared no more scholarly or comprehensive volume dealing with the international law problems of the World War, and also that the circumstances in which the papers were produced must cause them to be of permanent interest.

E. W.

A Preliminary Treatise on the Law of Real Property. By Elliott Judd Northrup. Boston: Little, Brown and Company. pp. 414.

The author states in his preface that the book is intended to serve as a text for a short course on real property law, each chapter to serve as a lesson. In dealing with students beginning the study of law, there are some parts of the law of real property which it is better to cover, in the main, by mere exposition. These include rules which can be stated with a certainty approximating mathematical certainty, and which are part of the historical background of the modern law of real property. Professor Northrup's work contains an exposition of such matters as the feudal system and tenure, estates, forms of concurrent ownership, seisin and disseisin, reversionary interests, vested and contingent remainders, the rule in Shelley's case, descent, curtesy, dower, and methods of conveyancing at the common law and under the Statute of Uses. The exposition is careful, compact, and clear.

There are other portions of the work which are less satisfactory. Such topics

as fixtures, easements, natural rights, waste, covenants running with the land, and covenants for title readily lend themselves to, and require for their understanding, a study of specific cases. An exposition of general principles is not only inadequate but is dangerous, because it leads students to believe that they have a sufficient understanding of the topics when they have not. Further, there are some topics mentioned in the work which are so difficult that they plainly should not be dealt with by brief summaries; for example, it is submitted that it is a mistake to present to a student, beginning the study of law, an exposition in sixteen pages of restraints on alienation and rules against remoteness.

The work covers familiar ground; but the author has an intellectual conscience, and he has made no attempt to attract attention by inventing a new vocabulary, and elaborating the familiar in the terms of such vocabulary. The author modestly states that the book is intended only for the use of students, but any teacher of an introductory course on the law of real property will find that a careful reading of the work is repaid by the suggestions which are implicit in the author's arrangement and distribution of emphasis.

E. H. W.

GOVERNMENT ORGANIZATION IN WAR TIME AND AFTER. By William Franklin Willoughby, Director of the Institute for Government Research. With an Introduction by Frederick W. Keppel, Third Assistant Secretary of War. New York and London: D. Appleton & Company. 1919. pp. xix, 370.

BRITISH WAR ADMINISTRATION. By John A. Fairlie. New York: Oxford University Press. 1919. pp. x, 302.

The administrative methods by which the two great English-speaking democracies mobilized for war and carried on the operations of war were at once so similar and so characteristically dissimilar that upon the appearance of two books on the subject, one dealing with America and one with England, the inevitable preliminary suggestion is that they be read together.

The necessities of modern warfare in all its complexity in one respect affected both countries in the same way. Single administrative authority in America and unified administrative authority in England for the mass of hitherto unclassified war measures became accomplished facts almost without interference by the legislative bodies and with the aid of enabling legislation of a most sweeping character. In America the war was administered by the President as Commander-in-Chief of the Army and Navy, with added powers liberally conferred upon him by Congress. In England, with centuries of administrative experience to draw from, the war was administered by a Cabinet in its various forms, acting through Orders in Council by virtue of the royal prerogative, supplemented by many enabling acts passed by a willing Parliament, and by a procedure which reverted to the form of the Elizabethan Privy Council, but which operated through administrative agencies such as were forecast by the Parliamentary Government in the time of Pitt. The British War Cabinet eventually became a committee not of Parliament but of the Privy Council, and the heads of important ministries often were not members of Parliament at all.

As to the measures adopted by the ultimate administrative authorities in the respective countries, a comparison of substantive characteristics would lead too far afield even for casual reference. Once a substantive measure was determined upon, the administrative methods by which it was to be accomplished often differed materially in the two countries. In America public opinion was

mobilized to an extent nowhere else equalled. Indirect action through public opinion, semi-indirect action, as for instance in the control exercised through priority regulation, played an important part. Actual control was often accomplished with a minimum of organization by means of a license system. In cases of actual government operation a piece of operative machinery was devised which, if government ownership increases, will doubtless be heard of again as a means of escaping governmental inefficiency, namely, a corporation controlled by the Government, such as the War Finance Corporation and the United States Shipping Board — Emergency Fleet Corporation.

Through these American fields Mr. Willoughby leads us in a thorough and at the same time absorbing fashion. Space forbids pausing in any particular field. In each the growth was gradual, often through voluntary or semiofficial bodies, until the effective instrumentality was finally evolved. If in the mass of detail which he has accurately traced Mr. Willoughby has, from lack of record or for other cause, occasionally missed some step in an evolution, one can in fairness speak only in commendation of the success with which he has surmounted most of the inevitable difficulties of the current historian. If any criticism is permissible, it would be that Mr. Willoughby keeps the reader a little puzzled as to his point of view and the scope of his work. It is clearly not a critique of substantive measures. In reality it is not a critique at all, although the author occasionally permits himself a little critical discussion, sometimes of the conception of an administrative measure, sometimes of its administration, and sometimes of how it worked. The discussion, when indulged in, is intelligent, and because of it the book gains in interest even if it loses in point of view. Mr. Willoughby has given us not only a valuable handbook but a readable book.

Professor Fairlie's work on British War Administration is one of a series of Preliminary Economic Studies of the War edited by Professor David Kinley under the auspices of the Division of Economics and History of the Carnegie Endowment for International Peace. Professor Fairlie fixes his point of view logically and rarely departs from it. His first chapter draws in scholarly fashion the historical background of British War Administration. The rest of the book consists of a careful statement of the actual administrative measures adopted by the British Government throughout the Great War. The work is not a critique and does not purport to be, but it is none the less an important historical record.

J. G. P.

BOSTON, MASS.